(7)

No. 88-1775-CSX
Status: GRANTED

Title: Gary E. Peel, Petitioner
v.
Attorney Registration and Disciplinary Commission of Illinois

Docketed:
May 2, 1989

Court: Supreme Court of Illinois

Counsel for petitioner: Ennis Jr.,Bruce J., Verrilli Jr.,Donald B.

Counsel for respondent: Moran III,William F.

Entry	Date	Note	Proceedings and Orders
1	May 2 1989	G	Petition for writ of certiorari filed.
2	May 31 1989		Brief of respondent Atty. Regist., etc. of IL in opposition filed.
3	Jun 1 1989	G	Motion of National Board of Trial Advocacy for leave to file a brief as amicus curiae filed.
4	Jun 2 1989	G	Motion of Association of Trial Lawyers of America, et al. for leave to file a brief as amici curiae filed.
5	Jun 6 1989		DISTRIBUTED. June 22, 1989
7	Jun 23 1989		REDISTRIBUTED. June 29, 1989
8	Jul 3 1989		Motion of National Board of Trial Advocacy for leave to file a brief as amicus curiae GRANTED.
9	Jul 3 1989		Motion of Association of Trial Lawyers of America, et al. for leave to file a brief as amici curiae GRANTED.
10	Jul 3 1989		Petition GRANTED.
			**********
11	Jul 20 1989		Record filed.
		*	Certified copy of original record received.
13	Jul 25 1989		Order extending time to file brief of petitioner on the merits until September 2, 1989.
22	Aug 22 1989	G	Motion of Academy of Certified Trial Lawyers of Minnesota for leave to file a brief as amicus curiae filed.
14	Aug 31 1989	G	Motion of American Advertising Federation, Inc. for leave to file a brief as amicus curiae filed.
15	Sep 1 1989		Joint appendix filed.
16	Sep 1 1989		Brief of petitioner Gary E. Peel filed.
17	Sep 1 1989	G	Motion of Public Citizen for leave to file a brief as amicus curiae filed.
18	Sep 1 1989	G	Motion of Association of Trial Lawyers of America, et al. for leave to file a brief as amici curiae filed.
19	Sep 1 1989	G	Motion of Association of National Advertisers, Inc. for leave to file a brief as amicus curiae filed.
20	Sep 1 1989	G	Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae filed.
21	Sep 1 1989		Brief amicus curiae of Federal Trade Commission filed.
23	Sep 2 1989	G	Motion of National Board of Trial Advocacy for leave to file a brief as amicus curiae filed.
24	Sep 18 1989	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
25	Oct 2 1989		Motion of Academy of Certified Trial Lawyers of

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No. 88-1775-CSX

Entry	Date	Note	Proceedings and Orders
			Minnesota for leave to file a brief as amicus curiae GRANTED.
26	Oct 2 1989		Motion of American Advertising Federation, Inc. for leave to file a brief as amicus curiae GRANTED.
27	Oct 2 1989		Motion of Public Citizen for leave to file a brief as amicus curiae GRANTED.
28	Oct 2 1989		Motion of Association of Trial Lawyers of America, et al. for leave to file a brief as amici curiae GRANTED.
29	Oct 2 1989		Motion of Association of National Advertisers, Inc. for leave to file a brief as amicus curiae GRANTED.
30	Oct 2 1989		Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
33	Oct 5 1989		Brief of respondent Atty. Registration and Disciplinary Comm. of Illinois filed.
31	Oct 10 1989		Motion of National Board of Trial Advocacy for leave to file a brief as amicus curiae GRANTED.
32	Oct 10 1989		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
34	Nov 2 1989		Reply brief of petitioner Gary E. Peel filed.
35	Nov 27 1989		SET FOR ARGUMENT WEDNESDAY, JANUARY 17, 1990. (1ST CASE)
36	Nov 30 1989		CIRCULATED.
37	Jan 17 1990		ARGUED.

88- 1775

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GARY E. PEEL,

Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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May 2, 1989

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QUESTIONS PRESENTED

I. Does the First Amendment to the Constitution of the United States permit the Illinois Supreme Court, in direct and acknowledged conflict with two other State supreme courts, to impose public censure on an attorney for stating on his letterhead the truthful and readily verifiable fact that he had been certified as a specialist in civil trial advocacy by the National Board of Trial Advocacy?

II. Is a statement from one attorney to another attorney that did not itself propose a commercial transaction, and that was not directly or primarily used or designed to solicit a commercial transaction, subject to regulation as "commercial speech" simply because the statement could indirectly come to the attention of members of the public who might need legal services?

III. Does the First Amendment to the Constitution of the United States permit the Illinois Supreme Court to impose a blanket prohibition, rather than a less restrictive form of regulation, on *all* statements that an attorney is a certified specialist, when the statement at issue was not false, misleading or deceptive on its face, and was not shown to have misled anyone?

IV. Does the Equal Protection Clause of the Fourteenth Amendment permit application of a blanket prohibition to petitioner when statements concerning specialization in patent, admiralty or trademark law are exempted from the prohibition, and when attorneys may make the less meaningful and less verifiable statement that they "limit their practice to" or "concentrate their practice in" civil trial advocacy?

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ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner Gary E. Peel respectfully prays that a writ of certiorari issue to review the Order and Judgment of the Illinois Supreme Court entered on February 2, 1989.[1]

OPINIONS BELOW

The February 2, 1989 opinion and judgment of the Illinois Supreme Court adopting the recommendation of the Review Board of the Illinois Attorney Registration and Disciplinary Commission ("ARDC"), and imposing public censure on petitioner, is reported at 126 Ill.2d 397, 534 N.E.2d 980 (1989), and is reprinted in the Appendix to this petition at 1a. The one-page Report And Recom-

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[1] The parties to the proceeding below were petitioner and the Illinois Attorney Registration and Disciplinary Commission ("ARDC").

mendation Of The Review Board of the ARDC, entered February 17, 1988, is unreported and is reprinted at 16a. The Report of the Hearing Panel, Findings of Facts, Conclusion of Law and Recommendations of the Hearing Board of the ARDC, entered August 27, 1987, is unreported, and is reprinted at 17a.

JURISDICTION

The Order and Judgment of the Illinois Supreme Court was entered on February 2, 1988. Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 2-105(a) of the Illinois Code of Professional Responsibility (107 Ill. 2d R. 2-105(a)), provides:

> "Rule 2-105. Limitation of Practice
>
> (a) A lawyer shall not hold himself out publicly as a specialist, except as follows:

> (1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation 'Patents,' 'Patent Attorney,' 'Patent Lawyer,' or 'Registered Patent Attorney' or any combination of those terms, on his letterhead and office sign.
>
> (2) A lawyer engaged in the trademark practice may use the designation 'Trademarks,' 'Trademark Attorney' or 'Trademark Lawyer,' or a combination of those terms, and a lawyer engaged in the admiralty practice may use the designation 'Admiralty,' 'Proctor in Admiralty' or 'Admiralty Lawyer,' or a combination of those terms, in any form of communication otherwise permitted under Rules 2-101 through 2-104.
>
> (3) A lawyer or law firm may specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice. Except as set forth in Rule 2-105(a), no lawyer may hold himself out as 'certified' or a 'specialist.'" (107 Ill.2d R. 2-105.)

STATEMENT OF THE CASE

The relevant facts are simple and undisputed.[2] Petitioner was licensed to practice law in Illinois in 1968, in Arizona in 1979, and in Missouri in 1981. Hearing Transcript ("H.Tr.") at 23; 28a. In 1981, after satisfying the rigorous standards of the National Board of Trial Advocacy ("NBTA"), petitioner was certified by the NBTA as a specialist in civil trial advocacy. H.Tr. at 26; 30a.

Founded in 1976, NBTA is an organization dedicated to improving the quality of the trial bar and enhancing

[2] At the hearing before the Hearing Board of the ARDC on July 27, 1987, the attorney for the Administrator of the ARDC stated in both his opening and closing arguments that "the facts" were "about as simple" as any case the Board would ever see. Hearing Transcript ("H.Tr.") at 13 and 38; 25a and 34a.

the delivery of legal services to the public by providing a reliable national credentialling process for specialists in trial advocacy. NBTA certifies only those who meet its exacting objective standards of experience, ability and concentration in trial advocacy.[3] The organization is sponsored by the American Trial Lawyers Association, the International Society of Barristers, the National Association of Criminal Defense Attorneys, the National Association of Women Lawyers, the American Board of Professional Liability Attorneys, and the National District Attorneys' Association. And it is overseen by a distinguished board of judges, practitioners and academics.

In 1983, petitioner began placing on his letterhead the truthful statement that he was certified as a civil trial specialist by the National Board of Trial Advocacy.[4] Petitioner then used that letterhead in the "ordinary course" of his practice of law. H.Tr. at 21; 26a. He did not use

[3] Certification as a civil trial specialist requires membership in good standing of a state bar, at least five years of actual practice in civil trial law in the period immediately preceding application, a showing that at least 30% of the attorney's time during the five year period has been spent in civil trial practice, appearance as lead counsel in at least fifteen civil matters through judgment (including not less than 45 days of trial, and at least 5 jury trials), appearance as lead counsel in at least forty additional matters involving the taking of testimony, participation in 45 hours of continuing legal education in civil advocacy in the three years preceding application, peer review by at least six attorneys (including a judge before whom the attorney has appeared), adequate written work, and successful completion of a rigorous day-long examination. *See* Brief *Amicus Curiae* of National Board of Trial Advocacy *in In re Gary E. Peel* NO. 87-SH-76.

[4] A reproduction of petitioner's letterhead can be found in the Appendix hereto at 21a. Petitioner's letterhead statement that he is a certified civil trial specialist by NBTA is accurate and non-misleading. Petitioner is, for example, listed in a directory of "Certified Specialists and Board Members" of NBTA. Furthermore, the State has not alleged, and no evidence was offered at petitioner's hearing to prove, that the letterhead statement was false or misleading as a factual matter.

the letterhead, or the statement that he was a certified specialist, as part of any direct effort to solicit new clients, and the ARDC has never claimed that he did. Specifically, petitioner has never used that statement "in the yellow pages," and he has "not mailed out brochures, advertisements or other types of printed materials" containing that statement. H.Tr. at 30; 31a.[5]

On April 15, 1986, while acting as an attorney for two *other* attorneys who were the subject of disciplinary proceedings before the ARDC, petitioner corresponded with his clients on his regular letterhead. This letter was attached as an exhibit to a submission by the clients to the ARDC. The Administrator of the ARDC noted the statement concerning certification by the NBTA on petitioner's letterhead, and himself initiated a complaint by the ARDC that was explicitly based on the letter from petitioner to his clients. No lawyer and no member of the public had (or has) ever complained to petitioner or to the ARDC about that statement.[6]

[5] Except for his letterhead, the fact of petitioner's certification by the NBTA was publicized in only two other ways. In 1981, when he was first certified (petitioner was recertified in 1986), "[t]here was a newspaper announcement in the business section of the local Edwardsville [Illinois] newspaper which said that basically that Gary Peel had been recently certified as a civil trial specialist by the National Board of Trial Advocacy . . . ." H.Tr. at 29; 31a. The fact of certification also appears in petitioner's Martindale-Hubbell listings. H.Tr. at 30; 31a.

[6] This fact is undisputed. At the hearing before the ARDC, petitioner testified as follows:

> "MR. BOSSLET: Q Let me finally ask you, Mr. Peel, because I alluded to it in my opening statement, has any client or layman ever questioned or expressd concern about your listing yourself being certified as the National Board of Trial Advocacy—.
>
> MR. MORAN: Objection. Calls for hearsay.
>
> CHAIRMAN WARREN: We'll let him answer.
>
> THE WITNESS: A No, I have never had any client or lay person question its propriety. The only thing that I have,

The complaint alleged, in relevant part, that petitioner's letterhead statement violated Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility, which states that except as provided in that rule, "no lawyer may hold himself out as 'certified' or a 'specialist.'" [7]

Beginning with his first communication with the ARDC concerning the charges against him, petitioner consistently, repeatedly, and at every available stage, challenged the constitutionality of the disciplinary rules and their application to him. He explicitly relied on the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, prior decisions of this Court, and the decisions of two other State Supreme Courts, both of which had held that their states could not constitutionally prohibit attorneys from truthfully advertising that they had been certified as civil trial specialists

as a result of the charges brought here today, I have called this to the attention of various other attorneys in my geographical area who have expressed some dismay with the charges, but there has been nothing from the lay person.

MR. BOSSLET: Q Have any attorneys, any other practicing attorneys complained to you about your listing that certification?

MR. MORAN: Same objection.

CHAIRMAN WARREN: Sustained."

H.Tr. at 35; 32a. And in response to interrogatories propounded by petitioner, the ARDC acknowledged that the only persons who "initiated the investigation of the charges which led to the filing of the Complaint" against petitioner were the administrator of the ARDC and his counsel.

[7] The exception clause is completely meaningless because nothing in Rule 2-105(a) permits any attorney in any circumstance to hold himself out as "certified" or as a "specialist" in any area of law. Although attorneys may hold themselves out as "patent lawyers," or "trademark lawyers," or "admiralty lawyers," and may say they "concentrate" or "limit" their practice to specified areas of law, nowhere does the rule permit any attorney to use the words "certified" or "specialist."

by the NBTA.[8] The Illinois Supreme Court considered and squarely rejected those federal constitutional challenges,[9] even though it acknowledged that two other state supreme courts had held that blanket prohibition of statements concerning certification or specialization—including statements concerning certification by NBTA—violated the First Amendment. 534 N.E.2d at 982; 4a-6a.

At the hearing on the complaint, the Administrator of the ARDC took the position that petitioner's letterhead violated Rule 2-105(a)(3) and was misleading *as a matter of law.*[10] The Administrator did *not* claim the letterhead was misleading as a matter of fact, and no evidence was presented that anyone had, in fact, been misled by the letterhead statement. The text of Rule 2-105(a)(3) does not itself require any showing that use of the words "certified" or "specialist" is misleading.[11] The Adminis-

[8] *See* 22a (petitioner's response to ARDC complaint). *See also* Petitioner's Motion to File First Set of Interrogatories; Petitioner's Motion to Dismiss ARDC Complaint.

[9] 534 N.E.2d at 983-986; 12a-14a (First Amendment); 534 N.E.2d at 986; 14a (Equal Protection).

[10] The attorney for the Administrator argued, as follows: "I believe it's a question of law whether or not the facts that have been presented here today show that what [petitioner] places on his letterhead is misleading or not . . . ." H.Tr. at 37; 33a. In interrogatories, petitioner had asked the Administrator to provide the names of any persons who considered his letterhead statement to be misleading. The Administrator responded that petitioner, not the Administrator, would have that information.

[11] *Other* disciplinary rules, which petitioner was *not* found to have violated, expressly turn on whether the communication at issue was or was not misleading. For example, Rule 2-101(b) prohibits "any commercial publicity or other form of public communication (including any newspaper, magazine, telephone directory, radio, television or other advertising)" unless that communication contains "all information necessary to make the communication not misleading" and does "not contain any false or misleading statement or otherwise operate to deceive." Petitioner was also charged with violation of Rule 2-101(b), and the Administrator

trator was apparently forced to argue that use of those words on petitioner's letterhead was misleading as a matter of law because the Administrator recognized that the *Constitution* prohibits state regulation of truthful attorney advertising unless it is misleading.[12]

Crucially, the Administrator did *not* claim that the NBTA was a bogus organization, or that certification by NBTA would not provide meaningful information to prospective consumers of legal services. To the contrary, the Administrator was willing to assume that NBTA is

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pressed that charge at the hearing. H.Tr. at 40-41; 34a-35a. Indeed, he referred to this charge as the *most important* levied against petitioner. *Id.* However, apparently because there was no evidence that petitioner's letterhead statement was, in fact, false, misleading or deceptive, the Hearing Board rejected that charge and only found petitioner in violation of Rule 2-105(a)(3). The Administrator did not take exceptions to or appeal from rejection of his charge under Rule 2-101(b). Consequently, the only rule at issue before the Review Board and before the Illinois Supreme Court was Rule 2-105(a)(3).

[12] In the Administrator's Memorandum to the Hearing Board opposing petitioner's motion to dismiss the disciplinary charges against him, the Administrator repeatedly expressed his belief, citing decisions of this Court, that the only attorney advertising that can *constitutionally* be regulated or prohibited is advertising that is false, misleading or deceptive. For example: "The United States Supreme Court, though, while holding that lawyer advertising is protected speech, has held that lawyer advertising can be regulated and in some instances, can be completely banned. The Court has justified this position by finding that advertising by the professions poses special risks of deception. . . . As to regulation of lawyer advertising, the United States Supreme Court had held, '[R]egulation—and imposition of discipline—are permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive.' *In re R.M.J.*, 455 U.S. 191, 202 (1982). Simply, lawyer advertising that is false, deceptive or misleading is subject to restraint. . . . In conclusion, [petitioner's] 'advertising' is misleading and therefore can be regulated by the Supreme Court of Illinois."

a legitimate organization and that certification by the NBTA would provide meaningful information to consumers. No other factual assumption was reasonably possible, given the stature and reputation of NBTA. As the Supreme Court of Minnesota recognized in an analogous context:

> "The NBTA is co-sponsored with the American Trial Lawyers Association, the International Academy of Trial Lawyers, The International Society of Barristers, the National Association of Criminal Defense Attorneys, the National Association of Women Lawyers, the American Board of Professional Liability Attorneys, and the National District Attorneys' Association. NBTA applies a rigorous and exacting set of standards and examinations on a national scale before certifying a lawyer as a trial specialist, either criminal or civil or both."

In re Johnson, 341 N.W.2d 282, 283 (Minn. 1983).

Similarly, the Task Force on Lawyer Competence of the Conference of Chief Justices found in a 1982 report that:

> "The National Board of Trial Advocacy, a national certification program that provides recognition for superior achievement in trial advocacy, uses a highly-structured certification process in addition to a formal examination to select its members. . . . [C]ertification by the National Board of Trial Advocacy is an arduous process that employs a wide range of assessment methods and entails considerable cost to the candidate."

Report With Findings and Recommendations to The Conference of Chief Justices, May 26 1982 (Publication Number NCSC-021).

In the view of the Administrator, however, a categorical ban on *all* certification programs was the only way the state could prevent "bogus" certification groups from

"popping up" and conferring meaningless certifications.[13] Thus, the Administrator argued that a flat ban on statements about certification and specailty was necessary as a prophylactic rule, even though the record in the present proceedings contained not a shred of evidence suggesting a risk of the harms such a rule is meant to guard against.

The Hearing Board did not find, in its findings of fact, that petitioner's letterhead statement about certification by the NBTA was misleading. Instead, the Board held, in its "Conclusion of Law," that the statement was misleading because the Illinois Supreme Court had not approved any form of certification: "We hold it is 'misleading' as our Supreme Court has never recognized or approved any certification process."[14] The Board gave no indication of how the absence of state approval might render the statement on petitioner's letterhead misleading, but presumably the Board acted in response to the arguments put before it by the Administrator. Thus, even though certification by the NBTA would provide meaningful information to consumers, the Administrator

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[13] The Administrator argued to the Hearing Board as follows: "In this case, the [state] interest is clearly the [Illinois Supreme] Court's interest in having *bogus* certification groups pop up or things that you just sign in correspondence courses, things of that nature, where the certification would be meaningless. The *Administrator doesn't argue either way about the meaningfulness of a certification by the National Board of Trial Advocacy*, but by having a *complete ban* on saying attorneys are certified or specialists, that is tailoring a substantial state interest that is protecting people from either meaningless or false information by having that ban an *entire ban* that is the best possible remedy to the situation that is before the Court." H.Tr. at 49-50 (emphasis added); 37a.

[14] Report of the Hearing Panel Findings of Facts, Conclusion of Law and Recommendations of the Hearing Board, at 5; 20a. The Hearing Board's use of quotation marks around the word misleading is consistent with its refusal to find petitioner's letterhead statement to be misleading as a matter of fact.

convinced the Board to impose a "prophylactic ban," because that prophylactic rule would block the emergence of "spurious certifying organizations whose certifications would be meaningless."[15]

The Illinois Supreme Court affirmed the Hearing Board's recommendation for public censure. The Court was somewhat more forthcoming as to the basis for its ruling. The primary basis for the court's decision was the purported need for a sweeping prophylactic rule to prevent deception of prospective clients. The Court made no effort to ascertain whether the actual statement on petitioner's letterhead either misled or could have misled prospective clients. Nor did the Court point to any *evidence* to support the purported risk of deception. The Court also held that petitioner's statement about certification was misleading because it might create the false impression that the State of Illinois—and not a private organization—had certified petitioner as a specialist. The Court did not explain how this impression might be created notwithstanding the explicit statement on the letterhead that petitioner was certified by the "*National* Board of Trial Advocacy." 534 N.E.2d at 986; 13a.

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[15] Memorandum of the Administrator in opposition to petitioner's motion to dismiss, at 5:

> "The substantial state interest involved in this situation is the protection of the public from false or misleading information. Lawyer advertising concerning the quality of legal services is inherently misleading. In addition, permitting claims of certification or specialty by attorneys in their advertising, would likely spawn spurious certifying organizations whose certifications would be meaningless. Therefore, a ban on this type of attorney advertising is appropriate.
>
> The prophylactic ban described above is the only means available to the Supreme Court of Illinois to advance its substantial state interest. Claims as to quality of legal services are not susceptible to measurement or vertification. Therefore, the only possible means of regulation in this situation is to ban claims of 'certification' or 'specialty.'"

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISIONS OF TWO OTHER STATE SUPREME COURTS, BOTH OF WHICH HAVE HELD THAT THE FIRST AMENDMENT DOES NOT PERMIT A COMPLETE PROPHYLACTIC BAN ON TRUTHFUL STATEMENTS BY ATTORNEYS THAT THEY HAVE BEEN CERTIFIED AS CIVIL TRIAL SPECIALISTS BY THE NATIONAL BOARD OF TRIAL ADVOCACY.

The Supreme Courts of Minnesota and Alabama have squarely ruled that the First Amendment does not permit a categorical ban on truthful statements by attorneys that they have been certified as civil trial specialists by the NBTA. *In Re Johnson*, 341 N.W.2d 282 (Sup. Ct. Minn. 1983); *Ex Parte Howell*, 487 So. 2d 848 (Sup. Ct. Ala. 1986). In the present case, the Illinois Supreme Court acknowledged that "[t]he courts in *Howell* and *Johnson* were confronted with issues similar to those in the case at bar," and recognized that those cases "held that a blanket prohibition on an attorney's claiming 'certified civil trial specialist' violates the first amendment." 534 N.E.2d at 982; 4a-6a. The Court also acknowledged that subsequent to the decision in *Johnson*, Minnesota had been able to establish procedures to *regulate* claims to certification without categorically *prohibiting* such claims: "Subsequently, the Minnesota Code of Professional Conduct was amended to provide for certification of organizations similar to NBTA by the State Board of Legal Certification . . . in order to protect the public from spurious agencies and meaningless certifications." 534 N.E.2d at 982; 5a.

Nevertheless, although fully aware of the crucial distinction between regulation and categorical prohibition, the Illinois Supreme Court rejected the holdings in *Howell* and *Johnson*, and ruled that Illinois' blanket prohibition of all references to certification or specialization did not

violate the First Amendment.[16] As a result of these rulings, the First Amendment, which is supposed to mean the same thing throughout the land, protects the right of attorneys to truthfully state they have been certified as civil trial specialists by the NBTA if those attorneys practice in Minnesota or Alabama, but not if they practice in Illinois.

The conflict among these State Supreme Court rulings reflects a broader conflict among the laws and rules of many States, about the permissible scope of State regulation of attorney statements concerning certification or specialty. In some states, whether by rule or by formal or informal opinion, attorneys are permitted to state that they have been certified by the NBTA.[17] In others, they are not.[18] And this precise issue is pending for resolution by bar associations or disciplinary commissions in many other states.[19] These divergent treatments of the issue are doubtless the result of widespread uncertainty as to the constitutional limits on State authority to regulate attorney statements about certification and specialization.

This case thus presents a square conflict between the Supreme Court of Illinois and the Supreme Courts of Alabama and Minnesota on an important First Amendment issue, and is representative of a broader conflict, on

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[16] This conflict implicates one of the principal grounds noted by this Court as favoring review by certiorari in Rule 17.1(b) of the Rules of this Court: "When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort of or a federal court of appeals."

[17] *E.g.*, Rule 7.4A of the Connecticut Rules of Professional Conduct.

[18] *E.g.*, Rule 7.4 of the Pennsylvania Rules of Professional Conduct; Rules 7.2 and 7.4 of the Mississippi Rules of Professional Conduct.

[19] For example, the issue is presently pending in North Dakota.

this precise issue, among many other states. The First Amendment question was squarely raised and decided, and the relevant facts are, by respondent's own account, simple and undisputed. Accordingly, this is a paradigmatic case for exercise of this Court's jurisdiction to grant certiorari.

II. THE COURT BELOW DECIDED THREE IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND THE RESOLUTION OF THESE ISSUES BELOW CONFLICTS WITH THE GOVERNING PRINCIPLES OF PRIOR DECISIONS OF THIS COURT.

A. This Court Should Decide Whether Truthful Statements By Attorneys That Do Not Themselves Propose A Commercial Transaction, And That Are Not Primarily Or Directly Used To Advertise Or Solicit Clients, Can Be Regulated As Commercial Speech.

The Supreme Court of Illinois assumed without analysis that the statements on petitioner's letterhead were "commercial speech," and therefore could be regulated under the less exacting First Amendment standards applicable to that category of expression. This conclusion is in direct conflict with the standards previously set forth by this Court for regulating commercial speech. Alternatively, this case raises an important, unresolved question as to the "precise bounds of the category of expression that may be termed commercial speech." *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). *See generally* Supreme Court Rule 17.1(c).

Although commercial speech retains substantial First Amendment protection, "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas v. Public Service Comm'n of New York*, 447 U.S. 557, 563 (1980). In particular, States may pro-

hibit false, deceptive or misleading commercial speech, and may regulate even nonmisleading commercial speech if the regulation serves a substantial state interest and is no broader than necessary to achieve that interest. *Id.* at 564-566. This Court has repeatedly defined "commercial speech" by reference to "'the "commonsense" distinction between speech proposing a commercial transaction . . . and other varieties of speech.'" *Id.* at 562 (quoting *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 455-456 (1978). *Accord Shapero v. Kentucky Bar Association*, 108 U.S. 1916 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985).

The expression at issue in this case—petitioner's accurate letterhead statement that he is a certified civil-trial specialist—does not itself propose a commercial transaction, and was not made in the context of proposing a commercial transaction. The communication that triggered the disciplinary proceedings against petitioner was a letter by him to clients he was representing in proceedings before the ARDC, which came to the attention of the ARDC administrator. The only communications by petitioner submitted in evidence at his disciplinary hearing were that letter and a subsequent letter by him to the ARDC. The second letter responded to the ARDC's notification that petitioner was, because of that first letter, the subject of a disciplinary investigation. In neither of those letters did petitioner propose that his services be retained. To the contrary, petitioner was simply exercising the right—itself protected by the First Amendment—to advise clients concerning charges brought by a government tribunal and to respond to charges against him made by that tribunal.

At petitioner's disciplinary hearing, the Administrator of the ARDC did not claim or attempt to prove that petitioner had used his letterhead, or the statement that he had been certified as a civil trial specialist by the NBTA, as part of a general advertising campaign, or in any ef-

fort to solicit legal business from the general public or from any individual. The Administrator was content to establish that, in addition to his two communications with the ARDC, petitioner had used his letterhead to "correspond with other attorneys," and "in the ordinary course of [petitioner's] business of practicing law." H.Tr. at 21; 26a.

Thus, there was no claim or evidence that petitioner's letterhead had ever been mailed to any layperson who was not already a client, or that petitioner had ever used that letterhead, or the statement concerning certification by the NBTA, in the yellow pages, or in any advertisements, brochures, or other types of printed materials, and petitioner testified that he had not.[20] The Illinois Supreme Court, though noting this fact, apparently considered it immaterial. 534 N.E.2d at 982; 4a.

In disciplining petitioner notwithstanding the absence of any evidence that the statement at issue was used to propose a commercial transaction, the Illinois Supreme Court extended the boundaries of regulable commercial speech far beyond any recognized by this Court. *Every* commercial speech case concerning attorneys decided by this Court has involved advertising or solicitation. *See, e.g., Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988) (solicitation letters to potential clients); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (advertisement); *In re R.M.J.*, 455 U.S. 191 (1981) (advertisements); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (personal solicitation); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (price advertising). The decision of the Illinois Supreme Court is in direct conflict with the governing principles of these decisions.

Of course, even though petitioner did not directly use his letterhead to solicit legal business, he did send his

[20] See note 4 *supra*, and accompanying text.

letterhead to other lawyers, and referrals by other lawyers constitute a substantial portion of petitioner's legal business. Thus, the present facts pose the question whether statements by attorneys that do not themselves propose commercial transactions and that are not primarily or directly used to advertise or solicit clients should be deemed regulable "commercial" speech, simply because those statements may indirectly influence the choices prospective clients make. *See Riley v. National Federation of the Blind of North Carolina*, 108 S. Ct. 2667, 2677 (1988) ("It is not clear that a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking").

This is a question of enormous importance for the legal profession, and for States seeking to regulate the practice of law. An attorney's participation in bar association and civic activities will often be motivated in part by a desire to enhance professional opportunities by acquainting others in the profession and the community with the attorney's special knowledge and expertise. Similarly, an attorney's listing in a professional directory will contain information as to background, education and experience that may well influence the choices prospective clients make.

By extending the boundaries of commercial speech in this area of particular sensitivity, the decision of the Illinois Supreme Court threatens to sow confusion. This Court should grant certiorari to make clear that the First Amendment does not permit States to regulate statements of the kind at issue in this case when such statements do not occur in the context of proposing a commercial transaction. Alternatively, if the First Amendment is to be read to permit some State regulation of attorney expression that does not directly propose a commercial transaction, this Court should grant certiorari to provide needed guidance about the precise bounds of "commercial speech" in this context. *See Zauderer*, 471 U.S. at 637 (bounds are "subject to doubt").

B. This Court Should Decide Whether Truthful And Readily Verifiable Statements Concerning Legal Experience Can Be Categorically Prohibited, Or Whether Such Outright Bans Violate The First Amendment.

If the statements on petitioner's letterhead *are* subject to State regulation as "commercial speech," the decision of the Illinois Supreme Court conflicts with applicable decisions of this Court limiting the scope of State regulation of commercial speech by attorneys. The case also presents an important question as to the extent to which a State may impose a blanket prohibition on accurate and readily verifiable statements concerning legal experience.

The decisions of this Court permit a State to prohibit commercial speech by an attorney only if that speech is inherently misleading. *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. at 1921; *Zauderer*, 471 U.S. at 644-645; *In re R.M.J.*, 455 U.S. at 202-203. Furthermore, "the States may not place an absolute prohibition on certain types of *potentially* misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. at 203 (emphasis added). Restraints on commercial speech by attorneys must "be narrowly crafted to serve the State's purposes." *Zauderer*, 471 U.S. at 644. A State seeking to justify a blanket prohibition must make a substantial showing that less restrictive alternatives will not suffice. *Id.* at 648-649.

In *Zauderer*, the Court refused to uphold broad prophylactic rules against advertisements purporting to give legal advice and against advertisements using illustrations. In that case, the State had failed to demonstrate that the risks associated with these forms of expression could not be controlled by less restrictive means. Similarly, in *In re R.M.J.*, the Court refused to uphold a prophylactic rule limiting the ways attorneys could describe their field of practice. As in *Zauderer*, the Court found that the State had failed to demonstrate that the harms against which

it sought to guard could not be controlled by less restrictive means.[21]

The holding of the Illinois Supreme Court in this case is in direct conflict with these decisions. The primary justification asserted by the State for the blanket prohibition on statements about certification and specialization is the risk that potential clients will be unable to draw reliable inferences from the information because they will not know whether the certifying organization is *bona fide* or "bogus."[22] There can be no question, however, as to the *bona fides* of NBTA, the certifying organization in this case. As in *Zauderer*, therefore, the State seeks to justify a prophylactic rule against statements about certification and specialization "notwithstanding that [the] particular advertisement has none of the vices that allegedly justify the rule." 471 U.S. at 644.

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[21] "Were we to accept the State's argument in this case, we would have little basis for preventing the government from suppressing other forms of truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising. The First Amendment protections afforded commercial speech would mean little indeed if such arguments were allowed to prevail. Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading and the harmless from the harmful"

Zauderer, 471 U.S. at 646.

[22] The State's other purported justification for the blanket prohibition—that prospective clients will be misled into thinking that certification implies *certification by the State of Illinois*—is a makeweight. The statement on petitioner's letterhead explicitly states that certification was by the *National* Board of Trial Advocacy. The possibility that a reader would misunderstand this statement as implying certification by the State of Illinois is remote at best Thus, as in *Zauderer*, the purported State interest "is belied by the facts" before this Court. 471 U.S. at 645.

The State has not made any showing that less restrictive means than a blanket prohibition would not control whatever risks might be posed by claims of certification and specialization. In particular, the State—without explanation—simply refused to follow the holding of the Alabama Supreme Court on the identical question, that risks of misleading prospective clients can be controlled by a procedure for State licensure of specialists and certifying organizations. *See Ex Parte Howell*, 487 So.2d at 851. This is remarkable in light of the Court's specific acknowledgment that Minnesota had required a licensure procedure as a less restrictive means of regulating attorney speech about specialization and certification. 534 N.E.2d at 982; 5a. Nor did the Illinois Supreme Court consider whether the risk of misleading prospective clients might be controlled by a rule requiring *more* disclosure of information about the certification of specialty. *See Bates v. State Bar of Arizona*, 433 U.S. at 374 ("the preferred remedy is more disclosure rather than less").

At bottom, the State seeks to justify its blanket prohibition by reference to this Court's dictum in *In re R.M.J.*, that claims as to the quality of legal services "might be so likely to mislead as to warrant restriction." 534 N.E.2d at 984; 9a-10a (quoting 455 U.S. at 201). Equating statements about certification with claims about quality, the State argues that statements about certification are inherently misleading, and can therefore be banned. The holdings in *In re R.M.J.* and subsequent cases, however, do not support any such blanket restriction. Although this Court's prior cases have "left open the possibility that States may prevent attorneys from making *nonverifiable* claims regarding the quality of their services, they do not permit a state to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas." *Zauderer*, 471 U.S. at 640 n.9 (emphasis added).

In the present case, of course, petitioner has not made a nonverifiable, subjective claim as to the quality of his legal services. He has made a factual statement about certification; both the fact of certification and the level of experience to which certification attests are readily verifiable. This statement might lead some prospective customers to infer expertise in trial advocacy, but there is no reason to believe that the inference is misleading.

Although this Court's decisions do not support the State's claim that it can constitutionally prohibit *all* statements from which a prospective client might infer expertise or quality, the ruling below does illustrate significant confusion in the States about the extent to which attorney statements about competence may constitutionally be regulated. Obviously, such statements can range from wholly subjective assessments of skill—such as "he is an exceptional litigator"—to wholly factual statements about background, training and specialization from which competence can be inferred—such as the statement about NBTA certification at issue here. The facts of this case amply demonstrate the need for a discriminating analysis —as yet unarticulated by this Court—that accounts for the wide variation in types of statements about competence and experience.

Finally, blanket prohibitions of information about attorney certification disserve the very interests sought to be protected by this Court's decisions extending substantial First Amendment protection to commercial speech. The flat prohibition imposed by Illinois deprives prospective clients of information about programs that serve to *enhance* the quality of representation an attorney can offer. Far from being the "bogus" enterprises suggested by the State, NBTA and other certification programs in trial advocacy fulfill extremely important and unmet public needs. Former Chief Justice Warren E. Burger was among the first to recognize these needs and to urge certification programs to meet them. Over fifteen years ago Chief Justice Burger recognized "that some system

of certification for trial advocates is an imperative and long overdue step." [23] In his view, our failure to certify trial advocacy skills "has helped bring about the low state of American trial advocacy and a consequent diminution in the quality of our entire system of justice." [24] He expressly recommended "certification of the one crucial specialty of trial advocacy that is so basic to a fair system of justice and has had historic recognition in the common law systems." [25]

The Conference of Chief Justices (of the States) has also squarely endorsed specialization programs "as a means to ensure competent counsel and to enable the public to select the best representation of their interests." [26] The Conference of Chief Justices acknowledged that "specialization is a means to ensure competent representation that has been reviewed intensively in recent years by enhancing the performance of the bar and the ability of the public to identify appropriate counsel." [27] Two years later the Conference of Chief Justices approved a "Model State Court Lawyer Competence Program" that had been developed by the Conference of Chief Justices Committee on Lawyer Competence. That program is reprinted in "Promoting Lawyer Competence," 10 *State Court Journal* (Fall 1986) at 15-23. The model program expressly recommends that state supreme courts "should adopt rules that provide specific guidelines and

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[23] Burger, Warren E., "The Special Skills of Advocacy: Are Specialized Training and Certification or Advocates Essential to Our System of Justice?", 42 Fordham L. Rev. 227 (1973), at 227.

[24] *Id.* at 230.

[25] *Id.* at 240. See also at 239 and 241.

[26] Conference of Chief Justices' Resolution VII, titled "Court Recognition of State Specialization Plans," adopted by the Conference of Chief Justices Coordinating Council on Lawyer Competence at the Conference of Chief Justices Annual Meeting on August 2, 1984.

[27] *Id.*

formal structures under which attorneys may be provided . . . recognition or certification as specialists." *Id.* at 21.

Of course, the fact that a particular lawyer has been certified as a trial specialist will be of no assistance whatsoever to members of the public who are seeking experienced trial counsel unless that fact can be communicated to them. But as the United States noted in its *amicus* brief in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), "[u]nfortunately, however, there is not now sufficient information available to the public concerning legal services. Study upon study, author after author, reveals the gross ignorance of the public with respect to lawyers and legal services. . . . One of the major causes of this ignorance is doubtless the ban lawyers have imposed upon the dissemination of information about their services, their prices, and even their existence." *Amicus* brief at 24. That unfortunate fact was noted in the Court's opinion in *Bates*: "[s]tudies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services *or because of an inability to locate a competent attorney.*" 433 U.S. at 370 (emphasis added). The ruling of the Illinois Supreme Court in this case exacerbates this problem.

C. The Court Should Decide Whether Illinois' Categorical Prohibition On Attorney Statements Containing The Words "Certified" Or "Specialist" Rationally Furthers Any Legitimate State Interest, Or Whether That Prohibition Violates The Equal Protection Clause Of The Fourteenth Amendment Because Attorneys Are Permitted To Communicate Similar Information So Long As They Do Not Use The Forbidden Words.

The State's prohibition of attorney statements about certification and specialization also conflicts with applicable decisions of this Court because—in the context of the rules governing attorney conduct in Illinois—the prohibition does not rationally further any legitimate state

interest. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

In Illinois, attorneys are explicitly *permitted* to make statements that they specialize in patent, trademark or admiralty law. They are also explicitly permitted to say that they "concentrate" their practice in particular specialty areas. Both the specific statements about specialization and general statements that attorneys concentrate in specific fields are factual statements from which prospective clients can and will draw inferences about the likely quality of an attorney's services, or the attorney's experience. A client with a tax problem, for example, will be more likely to pick an attorney who holds herself out as "concentrating" in tax because the client will reasonably assume that the attorney is better able to handle a tax problem than a lawyer with no experience in the field. Statements about speciality in admiralty, trademark or patent law, and statements of concentration in other fields, are thus indistinguishable in all relevant respects from the statement that petitioner is certified by the NBTA as a civil trial specialist. Indeed, if anything the statement at issue in the present case is *more* reliable than those permitted by Illinois law because NBTA's rigorous requirements for certification provide significant assurance that a certified attorney is in fact exceptionally qualified, whereas vague statements about "concentration" contain no such implicit assurance.

Accordingly, the distinction drawn in Illinois law between impermissible claims of certification or specialization and permissible statements about specialization in admiralty, patent and trademark law, and about concentration in a particular field is utterly irrational, and violative of the Equal Protection clause of the Fourteenth Amendment.[28]

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[28] Furthermore, Rule 2-105(a) burdens the fundamental right of access to the courts by unjustifiably depriving potential litigants of valuable information that would materially enhance their ability to obtain relief in the judicial system. The rule violates the Equal Protection clause for this reason as well.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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May 2, 1989

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APPENDICES

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APPENDIX A

SUPREME COURT OF ILLINOIS

No. 66771

IN RE GARY E. PEEL, ATTORNEY,
Respondent.

Feb. 2, 1989

William F. Moran, III, of Springfield, for the Administrator of the Atty. Registration and Disciplinary Commission.

Robert W. Bosslet, of Morris B. Chapman & Associates, of Granite City, for respondent.

Eugene I. Pavalon, of Chicago, and Jeffrey R. White, of Washington, D.C., for amicus curiae Association of Trial Lawyers of America.

Timothy Wilton, of Boston, Massachusetts, for amicus curiae National Board of Trial Advocacy.

Justice RYAN delivered the opinion of the court:

Gary E. Peel is an attorney licensed to practice law in the State of Illinois. In 1983, the respondent, Peel, began placing on his letterhead that he was certified as a civil trial specialist by the National Board of Trial Advocacy (NBTA). Rule 2-105(a) of the Illinois Code of Professional Responsibility prohibits an attorney from holding himself out as "certified" or a "specialist" other than in fields of admiralty, trademark, and patent law. (107 Ill.2d R. 2-105(a).) A panel of the Hearing Board of the Attorney Registration and Disciplinary Commission

(ARDC) recommended that the respondent be censured, and the Review Board affirmed the panel's recomendation. The respondent filed exceptions with this court concerning the Review Board's finding that his conduct was misleading and its recommendation that he be censured. This case presents the issue of whether Rule 2-105(a) is unconstitutional as applied to attorneys' advertising certification by the NBTA, because it violates the first amendment guarantee of free speech.

The basis for the alleged violation of Rule 2-105(a)(3) was respondent's professional letterhead, which reads:

> "Gary E. Peel
> Certified Civil Trial Specialist
> By the National Board of Trial Advocacy.
> Licensed: Illinois, Missouri, Arizona"

Rule 2-105 of the Illinois Code of Professional Responsibility provides:

"Rule 2-105. Limitation of Practice

(a) A lawyer shall not hold himself out publicly as a specialist, except as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation 'Patents,' 'Patent Attorney,' 'Patent Lawyer,' or 'Registered Patent Attorney' or any combination of those terms, on his letterhead and office sign.

(2) A lawyer engaged in the trademark practice may use the designation 'Trademarks,' 'Trademark Attorney' or 'Trademark Lawyer,' or a combination of those terms, and a lawyer engaged in the admiralty practice may use the designation 'Admiralty,' 'Proctor in Admiralty' or 'Admiralty Lawyer,' or a combination of those terms, in any form of communication otherwise permitted under Rules 2-101 through 2-104.

(3) A lawyer or law firm may specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice. Except as set forth in Rule 2-105(a), no lawyer may hold himself out as 'certified' or a 'specialist.'" (107 Ill.2d R. 2-105.)

The Administrator for the ARDC asserts that respondent's holding himself out as a civil trial specialist certified by the NBTA is misleading, because this court does not recognize any such specialty. The Administrator contends that the advertisement is misleading in three ways. First, a person reading respondent's letterhead would be led to believe that respondent is a specially qualified attorney. Because this court licenses attorneys in this State, the Administrator claims that a reader might be led to believe that this court certifies respondent's claimed specialty. Second, the Administrator contends that the terms "certified" and "specialist" are technical in nature and could easily mislead the public. Third, respondent's advertisement, according to the Administrator, must be construed as a claim to the quality of legal services he provides, which is inherently misleading.

The respondent contends that the Supreme Court has extended the first amendment protection of commercial speech to lawyers' advertisements by prohibiting the State's right to subject lawyer advertising to a "blanket suppression." (See *Bates v. State Bar* (1977), 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810.) Although the respondent acknowledges that the Supreme Court held that misleading advertising by attorneys may be prohibited entirely (see *In re R.M.J.* (1982), 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64), he asserts that his claim that he is certified as a civil trial specialist by the NBTA would not mislead the public but instead would provide them with truthful, relevant information which would be helpful in the selection of a lawyer.

Similarly, the respondent asserts that claiming he is certified as a civil trial specialist is not even potentially misleading because it is a truthful statement. Furthermore, because the statement is not potentially misleading, the respondent contends, the State, at a minimum, is obligated to assert a substantial interest in order to prohibit the speech. In support of the assertion that the State has failed to establish a substantial interest in prohibiting the respondent from claiming he is a certified civil trial specialist, the respondent notes that Rule 2-105(a) allows admiralty attorneys to claim specialization without requiring the attorney to have any experience in that field of practice. Thus, the respondent claims the State has failed to establish a substantial interest in prohibiting the designation of certified civil trial specialist because it is not misleading or deceptive on its face. According to the respondent, the prohibition of Rule 2-105 is too restrictive because his designation of certified civil trial specialist cannot possibly mislead the public because it only appears on his professional letterhead which is generally sent to other lawyers and *present* clients.

Finally, respondent urges this court to follow two State supreme court cases which have held that a blanket prohibition on an attorney's claiming "certified civil trial specialist" violates the first amendment. (See *Ex parte Howell* (Ala.1986), 487 So.2d 848; *In re Johnson* (Minn. 1983), 341 N.W.2d 282.) The courts in *Howell* and *Johnson* were confronted with issues similar to those in the case at bar: Does the first amendment prohibit a State's proscription of advertising the designation of certified civil trial specialist by the NBTA? The Alabama Code of Professional Responsibility provided that it was inappropriate for an attorney to hold himself out as a specialist except in the historically accepted fields of admiralty, trademark and patent law. (*Ex parte Howell*, 487 So.2d at 849.) The Alabama Supreme Court held that the "advertisement of certification by the NBTA as a civil trial advocate would not be misleading or deceptive on its

face." (*Ex parte Howell*, 487 So.2d at 851.) The court, in *Howell*, noted that the public should be protected from potentially misleading representations and, therefore, directed the bar association to formulate a proposed rule and method for approving certifying organizations similar to the NBTA. (487 So.2d at 851.) Similarly, in *In re Johnson* the Minnesota court held that the disciplinary rule prohibiting lawyer advertising of a legitimate specialization certification was unconstitutional, in view of its overbreadth. The Minnesota court noted that members of the general public could be misled by claims of specialization when no guidelines for specialization in the profession had been drawn. The court noted, however, that the hearing panel of the Board of Professional Responsibility found that the advertisement was not misleading or deceptive. (*In re Johnson*, 341 N.W.2d at 285.) Subsequently, the Minnesota Code of Professional Conduct was amended to provide for certification of organizations similar to NBTA by the State Board of Legal Certification (Minnesota Rules of Professional Conduct, Rule 7.4 (b)), in order to protect the public from spurious agencies and meaningless certifications.

Amicus curiae the National Board of Trial Advocacy urges this court to follow other States which have amended their ethics rules to permit a statement of specialty certification so long as the lawyer is certified by an approved agency with rigorous standards. (See, *e.g.*, Alabama Code of Professional Responsibility, Temporary D.R. 2-112; Connecticut Rules of Professional Conduct, Rule 7.4A.) The NBTA noted in its brief that the States which have programs regulating the advertising of specialty certification have approved the NBTA because it is a reputable organization with rigorous and comprehensive certification standards.

Amicus submits that an attorney's claiming certification by the NBTA is not misleading or even potentially misleading. Moreover, *amicus* contends that certification

by the NBTA is precisely the sort of information which should be conveyed to the public and which is protected by the first amendment.

We begin our analysis of the issues by reviewing the constitutional limitations on the regulation of lawyer advertising. In *Bates v. State Bar* (1977), 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810, the Supreme Court declared that the first amendment protects some attorney advertising from State prohibition. The Court held that prohibitions on the advertising of legal fees for routine legal services were unconstitutional. (433 U.S. at 382, 97 S.Ct. at 2708, 53 L.Ed.2d at 834-35. The Court stated: "[C]ommercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." (433 U.S. at 364, 97 S.Ct. at 2699, 53 L.Ed.2d at 823.) The Court, in *Bates*, further noted that a complete ban on advertising is "highly paternalistic" (433 U.S. at 365, 97 S.Ct. at 2699, 53 L.Ed.2d at 824) and stated that "the preferred remedy is more disclosure, rather than less" (433 U.S. at 375, 97 S.Ct. at 2704, 53 L.Ed.2d at 830).

Following the landmark case of *Bates*, the Supreme Court resolved the issue of whether an attorney could be limited to a list of categories when describing his area of practice in an advertisement. (*In re R.M.J.* (1982), 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64.) In *In re R.M.J.*, attorney R.M.J. was disciplined by the Missouri Supreme Court because he listed in a newspaper advertisement areas of practice, some of which were not among the areas of practice designations allowed by the State disciplinary rules, and others deviated from the permitted terminology to describe the area. For example, R.M.J. advertised that he practiced "securities—bonds" and "personal injury." The governing rules did not provide for the listing of "securities—bonds," and "personal injury" was required to be listed as "tort law." Additionally, the advertisement stated that R.M.J. was admitted to practice before the United States Supreme Court, which was information not permitted under the State disciplinary rules. Finally, the advertisement failed to include the mandatory disclaimer of expertise. R.M.J. challenged all the prohibitions except for the validity of the disclaimer requirement. The Court, in *R.M.J.*, reemphasized that States could regulate claims of quality because they are more likely to mislead when the advertisement involves professional services. (455 U.S. at 201, 102 S.Ct. at 936, 71 L.Ed.2d at 73.) The Court then summarized the commercial speech doctrine as applied to advertising for professional services as follows:

> "Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, *e.g.*, a listing of areas of practice, if the information also may be presented in a way that is not deceptive." (*In re R.M.J.* (1982), 455 U.S. 191, 203, 102 S.Ct. 929, 937, 71 L.Ed.2d 64, 74.)

The Court found that the restriction on the listing of areas of practice did not serve a substantial State interest and reversed the discipline as contrary to the first amendment. 455 U.S. at 205, 102 S.Ct. at 938, 71 L.Ed. 2d at 75.

More recently, in *Zauderer v. Office of Disciplinary Counsel* (1985), 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652, the Supreme Court once again reviewed the discipline of an attorney for advertising. Zauderer was disciplined by the Ohio Supreme Court for placing an ad-

vertisement in a newspaper which (1) contained an illustration of a medical device alleged to have caused injuries to women; (2) solicited legal employment from other women who may have been injured by the medical device; and (3) stated, "[i]f there is no recovery, no legal fees are owed by our clients," but failed to include a statement that the client must pay litigation costs even if the lawsuit should be unsuccessful. (*Zauderer v. Office of Disciplinary Counsel* (1985), 471 U.S. 626, 630-33, 105 S.Ct. 2265, 2271-72, 85 L.Ed.2d 652, 659-61.) The Court held that it was permissible to discipline Zauderer for failing to disclose the responsibility for costs in contingent fee cases, but that the State could not impose discipline for the illustration or solicitation of employment through the newspaper advertisement. The Court held that mandatory disclosure of costs in contingent fee cases did not overly restrict the flow of information, because it permitted the advertisement of contingent fees but was necessary so that potential clients would no be misled into thinking that they would not have any expenses if the litigation was not successful. 471 U.S. at 650-53, 105 S.Ct. at 2281-83, 85 L.Ed.2d at 671-73.

The issue presented in this case is whether the current disciplinary rule of this court prohibiting the respondent from advertising certification by the NBTA survives recent decisions of the United States Supreme Court. As previously noted, the Administrator for the Attorney Registration and Disciplinary Commission (ARDC) asserts that respondent's claim of certification by the NBTA is misleading and, therefore, can be banned entirely.

The respondent contends that the ARDC failed to present any evidence concerning the potential of the claim of certification by the NBTA to mislead and, therefore, the State at a minimum must establish a *substantial interest* to warrant the blanket suppression. We do not

agree. The deception and confusion is particularly apparent in this case for two reasons. First, the claim of certification by the NBTA impinges upon the sole authority of this court to license attorneys in this State and is misleading because of the similarity between the words "licensed" and "certified." Webster's dictionary defines "certificate" as "a document containing a certified and usually official statement * * *, especially: a document issued by * * * a state agency * * * certifying that one has satisfactorily * * * attained professional standing in a given field *and may officially practice or hold a position in that field.*" (Emphasis added.) (Webster's Third New International Dictionary 366 (1986)). A "license" is defined by Webster's as "a right or permission granted * * * by a competent authority to engage in a business or occupation * * * or to engage in some transaction which *but for such license would be unlawful.*" (Emphasis added.) (Webster's Third New International Dictionary 1304 (1986).) Indeed, it is apparent from the foregoing that the general public could be misled to believe that the respondent may practice in the field of trial advocacy solely because he is certified by the NBTA. In respondent's letterhead, which we have set out above, directly below the statement concerning certification is the following: "Licensed: Illinois, Missouri, Arizona." The letterhead contains no indication that the licensure was by official organizations which had authority to license, whereas the certification was by an unofficial group and was purely a voluntary matter.

Additionally, the claim that the respondent is certified as a civil trial specialist by the NBTA is misleading because it tacitly attests to the qualifications of the respondent as a civil trial advocate. Because not all attorneys licensed to practice law in Illinois are certified by the NBTA, the assertion is tantamount to a claim of superiority by those attorneys who are certified. Notably, the Supreme Court has stated that claims as to the quality of legal services "might be so likely to mislead as to war-

rant restriction." *In re R.M.J.* (1982), 455 U.S. 191, 201, 102 S.Ct. 929, 936, 71 L.Ed.2d 64, 73.

Contrary to our finding, the *amici* and respondent insist that the claim of certification by the NBTA is not misleading. They argue that because of the rigorous standards of the NBTA, such certification carries with it a degree of assurance to the public of the attorney's competence. However, it is interesting to note that none of the briefs filed in support of the respondent agree as to what standards an attorney must meet to receive certification from the NBTA. In the respondent's brief, it is stated that "[t]o obtain certification by the National Board of Trial Advocacy, an attorney must have * * * acted as lead counsel in at least 40 jury trials carried to verdict, or 100 non-jury matters tried to conclusion, successfully score on a six-hour written examination, maintain continuing participation in continuing legal education, and obtained other standards and achievements." The Association of Trial Lawyers of America filed an *amicus* brief, in which it is stated that the primary requirements for certification "are that the attorney have at least five years experience in civil practice, including experience as lead counsel in at least 15 major cases tried to verdict." The National Board of Trial Advocacy also filed an *amicus* brief, in which it is stated that, to be certified, an attorney must "have appeared as lead counsel in not less than 15 complete trials of civil matters to verdict or judgment, including not less than 45 days of full trial; at least five of these trials must be to a jury. In addition, applicants must have appeared as lead counsel in at least forty additional contested matters involving the taking of testimony. These may include trials, evidentiary hearings, depositions, or motions heard before or after trial." Does certification mean that the attorney has tried 40, 15, or 5 jury trials to verdict? Does the requirement concerning 40 contested matters refer to 40 jury cases tried to verdict, as the respondent asserts, or

simply 40 hearings on motions, depositions and nonjury trials, as the National Board of Trial Advocacy claims? If certification conveys such a varied and uncertain understanding as to its meaning to the attorneys who are in this case contending for the cause of certification, and who should be knowledgeable as to its meaning, how much more confusing is the statement that an attorney is certified as a trial specialist likely to be to the general public?

In *In re Johnson* (Minn.1983), 341 N.W.2d 282, the Minnesota court acknowledged that members of the general public could be misled by claims of specialization when no guidelines for specialization in the profession have been drawn. In *Johnson*, however, since the hearing panel had found that the advertisement was not misleading or deceptive, the Minnesota court found that the blanket ban of its disciplinary rule was over-broad.

We are not confronted, as the Minnesota court was, by such a finding of our hearing panel. In our case, the hearing panel found that the letterhead with its statement that the respondent was certified as a trial specialist was misleading and deceptive. As noted above, in discussing *In re R.M.J.*, advertising which is misleading may be prohibited entirely.

The American Bar Association Model Rules of Professional Conduct were adopted by the House of Delegates of the American Bar Association in 1983. Rule 7.4 of the Model Rules contains a prohibition against a lawyer's holding himself out as a specialist similar to that contained in Rule 2-105 of our Code of Professional Responsibility, with the addition of an exception on designation of specialization of the particular State. The comment to Model Rule 7.4 says that a lawyer is permitted to indicate that he practices in certain fields or will not accept matters except in such fields. "However, stating that the lawyer is a 'specialist,' or that the lawyer's prac-

tice is limited to and 'concentrated in' particular fields is not permitted. These terms have acquired a secondary meaning implying formal recognition as a specialist. Hence, use of those terms may be misleading unless the lawyer is certified or recognized in accordance with procedures in the state where the lawyer is licensed to practice."

In a draft of the American Bar Association Standing Committee on Ethics and Professional Responsibility Report to the House of Delegates (Draft Report), dated August 29, 1988, it was recommended that the black letter of Model Rule 7.4 remain unchanged, but that the comment be amended to delete the language which states that a lawyer may not say that his practice is "limited to" or "concentrated in" particular fields. The Draft Report discusses *Bates*, *In re R.M.J.* and *Zauderer*, and concludes:

> "While these opinions appear to support a Rule 7.4 prohibition of a lawyer describing himself or herself as a 'specialist' except in certain limited areas, they also lead to questions about the language of the Comment to Rule 7.4 which prohibits a lawyer from advertising that his or her services are 'limited to' or 'concentrated in' particular fields." (Draft Report, at 3.)

Under the heading "Policy Consideration," the Draft Report states:

> "In view of the desirability of promoting accurate communication by lawyers concerning their services and experience, absolute prohibition of the phrases 'limited to' and 'concentrated in' is unwarranted. These phrases can provide valuable information to a consumer. Unlike the terms 'specialist,' 'practices a speciality' and 'specializes in,' the phrases 'limited to' and 'concentrated in' lack the clear implication of formal recognition of a specialist. Therefore, the comment to Rule 7.4 should not prohibit statements that a lawyer's practice is 'limited to' or 'concentrated in' a particular field." Draft Report, at 5.

The comment to Rule 7.4, after the recommended changes, would read:

> "This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services, for example, in a telephone directory or other advertising. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate. However, a lawyer is not permitted to state that the lawyer is a 'specialist,' practices a 'speciality,' or 'specializes in' particular fields. These terms have acquired a secondary meaning implying formal recognition as a specialist and, therefore, use of these terms is misleading. [An exception would apply in those States which provide procedures for certification or recognition of specialization and the lawyer has complied with such procedures. See Section (c) of this Rule.]" Draft Report, at 1.

Thus, the conclusion of the Draft Report is that the terms "specialist" or "practices a specialty" or "specializes in" particular fields have acquired a secondary meaning implying formal recognition as a specialist and use of these terms is misleading, except in States which provide procedures for such certification. This conclusion conforms to the findings of the Hearing Board in the case before us that the statement as used by the respondent on his letterhead is misleading. This is particularly so when the statement was used on respondent's letterhead in conjunction with information about official licensures in Illinois, Missouri and Arizona. As noted above, the Supreme Court in *In re R.M.J.* stated that misleading advertising may be prohibited entirely. (455 U.S. at 203, 102 S.Ct. at 937, 71 L.Ed.2d at 74.) This State has not provided any procedure for formal recogni-

tion of specialists in the practice of law. Therefore, the use of the information on respondent's letterhead stating that he is certified as a trial specialist by the National Board of Trial Advocacy is misleading. Rule 2-105(a) of our Code of Professional Responsibility, prohibiting the use of the term "specialist," is not violative of respondent's constitutional right of free speech.

Finally, respondent asserts that there is no rational justification for allowing attorneys practicing in admiralty to claim to be a specialist and not attorneys certified by the NBTA. In support of this assertion, respondent notes that "proctor in admiralty or trademarks lawyer" does not require that attorney to have any experience in those fields of practice. It should be noted at the outset that an attorney holding himself out as a specialist is distinct from a claim of certification. The claim of certification is potentially more misleading because it tacitly asserts "qualified." (See C. Wolfram, Modern Legal Ethics 205 (1986).) Additionally, allowing attorneys practicing in admiralty to advertise their specialties in no way implies that the admiralty attorney is more capable than any other admiralty attorney because all such attorneys may advertise the fact. Moreover, the historical basis for allowing attorneys specializing in patent, trademark and admiralty law to advertise their specialization had to deal with the difficulty of the general public in finding attorneys who practiced in such fields. (See *Silverman v. State Bar* (5th Cir. 1968), 405 F.2d 410, 414.) This historical distinction is not without difference; locating an attorney who is a civil trial advocate would not involve the same difficulty. Because Rule 2-105 permits attorneys or firms to designate areas in which their practices are concentrated or to which their practices are limited, so long as these claims do not imply certification by this court, Rule 2-105 is therefore not overly restrictive. See 107 Ill.2d R. 2-105, Committee Comments, at 624.

We adopt the recommendation of the Review Board and impose the sanction of censure on respondent.

RESPONDENT CENSURED.

Justice CALVO took no part in the consideration or decision of this case.

APPENDIX B

BEFORE THE REVIEW BOARD
OF THE
ILLINOIS ATTOREY REGISTRATION
AND
DISCIPLINARY COMMISSION

Administrator's No. 87 SH 76

IN THE MATTER OF: GARY PEEL,
Attorney-Respondent,

No. 2166259

REPORT AND RECOMMENDATION
OF THE REVIEW BOARD

[Filed Feb. 17, 1988]

After full consideration and review of all matters of record, the Review Board concurs with the findings of fact and conclusions of law of the Hearing Board and recommends that the Respondent be censured.

The Report and Recommendation of the Hearing Board is attached.

Respectfully submitted,

WATTS C. JOHNSON,
Chairman
HERBERT J. BELL
MICHEL A. COCCIA
C. WILLIAM FECHTIG
MARTIN L. SILVERMAN
Members, Review Board

Members John C. Menk and Marshall A. Susler did not participate. This matter decided February 12, 1988.

APPENDIX C

BEFORE THE HEARING BOARD
OF
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

No. 2166259

IN THE MATTER OF: GARY PEEL,
Attorney-Respondent.

REPORT OF THE HEARING PANEL
FINDINGS OF FACTS, CONCLUSION OF LAW AND
RECOMMENDATIONS OF THE HEARING BOARD

[Filed Aug. 25, 1987]

This matter was heard on July 27, 1987, before a Panel of the Hearing Board of the Attorney Registration and Disciplinary Commission upon the administrators Complaint consisting of one Count. The Complaint alleges the Respondent was licensed to practice law in Illinois on November 14, 1968. The administrator was represented by Daniel A. Drake and William Moran III and the Respondent by Robert W. Bosslet. Members of the Hearing Board Panel were Harland D. Warren, Chairman; Lloyd Schwiebert and Michael Flynn.

Count I alleged violation of Canon 1, Rule 1-102 (1), (Misconduct-violates a discipliary rule); also Canon 2, Rule 2-101 (b), (Publicity and Advertising) and Rule 2-105 (a) (3), (Limitation of practice-"certified", or a "specialist".)

On Motion of Mr. Drake, to which Mr. Bosslet had no objection, the Complaint was amended on its face as follows: Line 4 of the 1st paragraph, the word "trial" was added to read—"Certified Civil *Trial* Specialist". Motion allowed.

On July 21, 1987, the Respondent filed a Second Motion to Continue, indicating he was scheduled to begin a jury trial, medical malpractice suit, at 10:00 a.m., July 27, 1987, which had been scheduled for several months. This Motion for continuance was denied by the panel. Involved was the plaintiff from California, and Medical Doctors from Springfield and Jacksonville, Illinois and State of Michigan. He also recited additional reasons for a continuance including possible intervention as Amicus by the Illinois Society of the National Board of Trial Advocacy,

As for his scheduled jury trial (on Hearing date of July 27, 1987), panel member Michael Flynn brought to his attention that proof of service was dated July 8, his Motion for Continuance dated July 21, a lapse of time, 12 to 13 days. Mr. Bosslet then chose to proceed with the Hearing.

On July 7, 1987, Respondent filed a Motion under Rule 766, (b) (4), that the Hearing be "neither private nor confidenital". On July 9, 1987, the Administrator responded that he would no longer consider this matter to be private or confidential.

It was brought to the attention of the Panel, by the Administrator that Nick Geranious of the Associated Press in Springfield, IL, was in the witness room. The Chairman ruled, that since the Respondent had moved to waive the confidential proceedings rule, he should be permitted to attend the Hearing. The Chairman then inquired of Respondent's attorney, Mr. Bosslet, if there were any other nonessential persons that he wished to be in attendance. Mr. Bosslet replied in the negative. Mr. Geranious was seated in the Hearing Room.

FINDINGS OF FACTS

The Respondent, currently maintains law offices in Edwardsville (Madison County), Illinois, being licensed in Illinois, Missouri and Arizona.

In the year 1983, Respondent changed his letterhead to holding himself out as "Gary E. Peel, Certified Civil Trial Specialist—By the National Board of Trial Advocacy." (Adms Ex. #1) He testified that the possible conflict (violation) did not cross his mind until he received a letter from the Administrator dated April 15, 1986, advising him, that his letterhead may be in violation with Rule 2-105 (a) (3). (Adms Ex. #2)

Regardless, he still continued using the same letterhead in his correspondence. On April 28, 1986, Respondent wrote to the Administrator setting forth his rationale and reasons for continuing the use of his letterhead as a "Certified Civil Trial Specialist." (Adms Ex. #3). His letter to the Administrator took the position that lawyer specialty advertising "constitues a form of commercial free speech, proected by the first amendment, and that advertising by attorneys may not be subjected to blanket suppression." Also, that lawyer advertising may only be regulated or otherwise subject to restraint, where it is false, deceptive or misleading. (IN RE R.M.J. 455 U.S. 191, 102 S.Ct. 929, 71 L. Ed. 2nd 64 (1982).

The Respondent testified that after written and oral "screening tests, The National Board of Trial Advocacy of Washington, D.C., had issued him a "Certificate in Civil Trial Advocacy, dated September 1, 1981. (Resp. Ex. #1) After 5 years it could be renewed by the same screening tests, that it was renewed under date of August 31, 1986. (Resp. Ex. #2)

CONCLUSION OF LAW

The Illinois Supreme Court has the inherent authority to regulate the practice of law. In the case of IN RE: Day, 181 Ill., 73, (1899), the above rule was established,

as the result of a Legislative Act providing for the admission of attorneys upon receiving a diploma after two years of law school. This inherent power has been exercised by our Supreme Court, including the promulgation of Rule 2-105, Limitation of Practice, and in particular, (a) (3), no lawyer may hold himself out as "certified" or a "specialist". The Respondent, by holding himself out, on his letterhead as "Gary E. Peel, Certified Civil Trial Specialist—By the National Board of Trial Advocacy," is in direct violation of the above cited Rule.

We hold it is "misleading" as our Supreme Court has never recognized or approved any certification process.

RECOMMENDATION

It is the recommendation of the HEARING PANEL that the Respondent be censured in accordance with Rule 771, (g).

/s/ Harland D. Warren
HARLAND D. WARREN
Chairman

/s/ Lloyd Schwiebert
LLOYD SCHWIEBERT

/s/ Michael Flynn
MICHAEL FLYNN

APPENDIX D

Law Offices of Gary E. Peel
2 Center Grove Road
Edwardsville, Illinois 62025
(618) 692-0500

Gary E. Peel
Certified Civil Trial Specialist
By the National Board of Trial Advocacy
Licensed: Illinois, Missouri, Arizona

Debra J. Meadows
Licensed: Illinois
Missouri

APPENDIX E

Law Offices of Gary E. Peel
2 Center Grove Road
Edwardsville, Illinois 62025
(618) 692-0500

Gary E. Peel
Certified Civil Trial Specialist
By the National Board of Trial Advocacy
Licensed: Illinois, Missouri, Arizona

Scott Carl Cain
Licensed: Illinois

April 28, 1986

Attorney Registration and Disciplinary Commission
Supreme Court of Illinois
1 N. Old Capitol Plaza
Springfield, IL 62701

Attention: William F. Moran III

Re: Gary E. Peel at the Charge of the Administrator
No. 86-SI-3301

Dear Mr. Moran:

I have received your letter of April 15, 1986 and in response thereto I set forth the following:

My letterhead, which contains the terminology "Certified Civil Trial Specialist by the National Board of Trial Advocacy" would appear to conflict with Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility.

Since this Rule was initially promulgated, however, substantial inroads have been made into advertising and free speech when applied to the legal profession. The United States Supreme Court in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) found prohibitions on the advertising of legal fees unconstitutional. Later, the United States Supreme Court in *In Re R.M.J.* 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982) reiterated its statement in *Bates*

that lawyer specialty advertising constitutes a form of commercial free speech, protected by the first amendment, and that "advertising by attorneys may not be subjected to blanket supression".

I do not believe that Rule 2-105(a)(3) survives these United States Supreme Court decisions.

* * * *

To compound matters, the Illinois Supreme Court disciplinary rules do authorize an attorney to hold himself out to the public as having expertise in the fields of patent, trademark, and admiralty law, even without any criteria for doing so and even without any requirement that the attorney be qualified in those areas specified (see Rule 2-105(a)(1) and (2).

* * * *

Intending no disrespect to the Illinois Supreme Court or the Attorney Registration and Disciplinary Commission, it is my position here that Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility is unconstitutional on its face and as applied in one or more of the following respects:

A. It violates the First Amendment of the United States Constitution.

B. It violates Article I, Section 4 of the Constitution of the State of Illinois.

C. It violates Article 1, Section 2 (Equal Protection Clause) of the United States Constitution, and

D. It violates Article I, Section 2 (Equal Protection Clause) of the Constitution of the State of Illinois.

* * * *

Once you have had an opportunity to review this letter and perhaps also review other decisions which have addressed this issue (*Johnson v. Director of Professional Responsibility*, 341 N.W. 2d 282 (S. Ct. of Minn. 1983)

I would appreciate being advised as to the Commission's attitude on this matter.

Very truly yours,

/s/ Gary E. Peel
GARY E. PEEL

APPENDIX F

EXCERPT OF HEARING TRANSCRIPT

(Page 13)

* * * *

MR. FLYNN: Well, I appreciate your thought. I'd just like the record to reflect those dates because there's quite a lapse of time from the time you would have received the notice of the hearing and the time you filed the motion to continue.

CHAIRMAN WARREN: Any other preliminary matters?

(No response.)

CHAIRMAN WARREN: Mr. Moran?

MR. MORAN: May it please the Board, in this disciplinary case, the facts are going to be about as simple as any case this Board has probably ever seen. The evidence will show that beginning in 1983 and continuing until the present, Respondent has held himself out through his office letterhead as being a certified civil trial specialist by the National Board of Trial Advocacy.

* * * *

APPENDIX G

EXCERPT OF HEARING TRANSCRIPT

(Pages 20-26)

CHAIRMAN WARREN: Any objection?
MR. BOSSLET: No, sir.
CHAIRMAN WARREN: Admitted.

(Whereupon Administrator's Exhibit Number 2 for identification was admitted into evidence.)

MR. MORAN: Q So is it correct to say that it was on or about April 15, 1986, that you became aware of the fact that your leterhead might be in conflict with the rule of the Illinois Code of Professional Responsibility?

A That's correct.

Q After that time period, did you continue to use letterhead that was substantially similar in as held [sic] yourself out as a certified civil trial specialist?

A Yes.

Q And you continued to use letterhead substantially the same as you have described before to this day, is that correct?

A That's correct, to the extent that we are concerned here.

Q You just, briefly who this letterhead goes to, you send out office correspondence on this letterhead?

A That's correct.

Q You correspond with other attorneys with this letterhead?

A Yes.

Q It's used in the ordinary course of your business of practicing law?

A Yes, it is.

Q As a matter of fact, you even corresponded with the Administrator's office using this letterhead?

A Sure did.

Q I'll show you what's been marked as Administrator's Exhibit Number 3. Could you identify this?

A Yes. This is the original letter of mine dated April 28, 1986, addressed to the Attorney Registration and Disciplinary Commission in which I responded to your earlier exhibit and set forth the rationale and reason behind my use of the certification and the constitutional reasons why I felt that I could not be restricted from utilizing that certification.

MR. MORAN: At this time, the Administrator would offer Administrator's Exhibit Number 3 for the limited purpose of showing that Respondent does correspond using this stationery, this is one example of correspondence where this stationery has been used.

CHAIRMAN WARREN: Mr. Bosslet?

MR. BOSSLET: My only comment, sir, would be that I have no objection to it. I wouldn't want it to be admitted for that limited purpose because I think the cases cited and Respondent's opinions in there are worthy of the Board's consideration, too, so if Mr. Moran doesn't want to adopt it for that purpose, I will.

CHAIRMAN WARREN: That document speaks for itself and is admitted.

MR. MORAN: I will certainly state that the Administrator will have some objections to some of the law that is cited, but—.

CHAIRMAN WARREN: Admitted.

(Whereupon Administrator's Exhibit Number 3 for identification was admitted into evidence.)

MR. MORAN: The Administrator has no further questions and would rest his case at this time.

CHAIRMAN WARREN: Does the Panel have any questions of this witness?

Mr. Schwiebert?

MR. SCHWIEBERT: I think not.

MR. FLYNN: I don't have any, thank you.

CHAIRMAN WARREN: Thank you. Next witness?

MR. MORAN: The Administrator has no further witnesses and would rest at this time.

CHAIRMAN WARREN: Mr. Bosslet? Do you wish to proceed?

MR. BOSSLET: Yes, sir, I do. I would question Mr. Peel.

GARY E. PEEL

called as a witness in his own behalf, having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BOSSLET:

Q Gary, could you tell the Board in what states you are licensed to practice and in what years you were admitted.

A Admitted to practice in the State of Illinois in 1968; the State of Arizona, 1979; and the State of Missouri in 1981.

Q And could you tell us how it was you came to be admitted, whether by reciprocity or examination?

A I was admitted by reciprocity in Missouri and by examination in Arizona. Also by examination in Illinois.

Q And in what federal courts are you licensed to practice, Gary?

A Supreme Court of United States, 1975; United States Court of Appeals for the Seventh Circuit in 1974; United States Court of Appeals for the Eighth Circuit in 1980; United States District Court for the Southern District of Illinois, 1971; United States District Court for the Eastern District of Missouri in 1982.

Q Of what professional organizations or associations are you a member?

A I am a member of the American Bar Association. I'm the vice-chair of the Insurance and Tort Committee of the General Practice Session. I'm also a member of the Illinois State Bar Association; Arizona State Bar Association; Missouri State Bar Association; Madison

County Bar Association of which I was secretary in 1972 to 1973, vice-president from 1982 to 1983 and president from 1983 to 1984. Also a member of the Illinois Trial Lawyers Association; the Association of Trial Lawyers of America; I am past secretary of the Tri-City Bar Association, 1978 to 1979 and I'm also currently a member of the Metropolitan Municipal Bar Association.

MR. MORAN: Mr. Chairman, the Administrator wants to point out for the record that we have no objection—it appears as if Respondent is reading from a prepared document or piece of paper. We have no objection to him doing that for background. I'd just like to note that when it comes time for substantive testimony, that we would have an objection if he continues to read off a piece of paper.

CHAIRMAN WARREN: You're going to be overruled at this time. If you want to read, let the record so show.

MR. BOSSLET: It's his resume. If you want, we can mark it as an exhibit—.

MR. MORAN: Oh, no, we have no objection for background. We just wanted to point it out for the record.

MR. BOSSLET: Q Gary, have you lectured or taught any subjects associated with the practice of law?

A Yes, I have. I've taught for the Illinois Institute of Continuing Legal Education, courses basically tied into trial practice. I have also participated as both a lecturer and a teacher for the Association of Trial Lawyers of America, their basic trial advocacy course in which basically younger lawyers are videotaped and critiqued on a hypothetical-factual situation. That was done in St. Louis a couple of years ago at the St. Louis University Law School.

Q Now, how many jury-tried cases have you tried to verdict, Gary?

A In excess of 800 [sic—should read "a hundred"].

Q What about nonjury cases you've tried to conclusion?

A I would estimate in excess of three of [sic] four hundred.

Q And then what about cases that may not have gone to verdict, but cases in which you were acting as attorney, hearing motions, taking depositions, general preparation of a case that may not have had to be tried? How many cases have you handled?

A Well over a thousand.

Q Now, in 1981, you became certified by what organization?

A National Board of Trial Advocacy.

Q Do they have a particular field in which you are certified?

A Yes. At that time, and in fact I think even currently, they only have two available fields of specialization. One is as a criminal trial specialist and the other is civil trial specialist, and I was certified as a civil trial specialist.

* * * *

APPENDIX H

EXCERPT OF HEARING TRANSCRIPT

(Pages 29-30)

* * * *

A There was a newspaper announcement in the business section of the local Edwardsville newspaper which said that basically that Gary Peel had been recently certified as a civil trial specialist by the National Board of Trial Advocacy * * *. I have not placed it in the yellow pages, I've not mailed out brochures, advertisements, or other types of printed materials on the matter.

* * * *

Q Does it appear in Martindale-Hubble?

A As a matter of fact, it does now, that's correct. I don't believe it did in 1983. It may have been the last two or three issues that it appeared, yes.

Q Now, in the event someone would want to verify your specialization or certification, what bases are there for that?

A Well, it can be verified through the office of the National Board of Trial Advocacy which are located at 1050 31st Street Northwest, Washington, D.C., zip code 20007-4499, phone number 202-965-3500.

Q Now, Gary, do you feel that your publicizing, for lack of better terms, your certification on your letterhead is in any way useful or beneficial to the public?

MR. MORAN: Objection. That calls for an opinion —I don't know what the foundation for Respondent's response to that question is going to be.

CHAIRMAN WARREN: Sustained.

* * * *

APPENDIX I

EXCERPT OF HEARING TRANSCRIPT

(Page 35)

CHAIRMAN WARREN: Admitted.

(Whereupon Respondent's Exhibit Number 2 for identification was admitted into evidence.)

MR. BOSSLET: Q Let me finally ask you, Mr. Peel, because I alluded to it in my opening statement, has any client or layman ever questioned or expressed concern about your listing yourself being certified as the National Board of Trial Advocacy—.

MR. MORAN: Objection. Calls for hearsay.

CHAIRMAN WARREN: We'll let him answer.

THE WITNESS: A No, I have never had any client or lay person question its propriety. The only thing that I have, as a result of the charges brought here today, I have called this to the attention of various other attorneys in my geographical area who have expressed some dismay with the charges, but there has been nothing from the lay person.

MR. BOSSLET: Q Have any attorneys, any other practicing attorneys complained to you about your listing that certification?

MR. MORAN: Same objection.

CHAIRMAN WARREN: Substained.

* * * *

APPENDIX J

EXCERPT OF HEARING TRANSCRIPT

(Pages 37-41)

* * * *

CHAIRMAN WARREN: You have any response?

MR. MORAN: Well, the first point that the Administrator would make is clearly here we have a violation of Rule 2-105(a)(3), so the Administrator's complaint should stand and go to decision by this Board and should not be dismissed at this time.

Secondly, I believe it's a question of law whether or not the facts that have been presented here today show that what Respondent places on his letterhead is misleading or not and that's a question that is going to have to be decided by this Board and the Administrator will ask specifically that the Board make a ruling, one way or another, whether they believe that putting certified civil trial specialist on Respondent's letterhead is misleading when the Supreme Court, who has the inherent authority to regulate all facets of the practice of law, when the Supreme Court has not said that Respondent could do that or any other attorney could do that. For those two reasons, the Administrator objects to Respondent's motion to dismiss.

CHAIRMAN WARREN: Motion to dismiss is denied.

Are we ready now—evidence closed? Mr. Bosslet, is that—.

MR. BOSSLET: Yes, sir, that's right.

MR. MORAN: That's correct.

CHAIRMAN WARREN: And the Administrator?

MR. MORAN: That's correct.

CHAIRMAN WARREN: We have closing statements?

MR. MORAN: I have, Mr. Chairman.

CHAIRMAN WARREN: You may proceed.

OPENING ARGUMENT

BY MR. MORAN:

MR. MORAN: May it please the Board, as I've stated, the facts of this case are about as simple as you're going to see in a disciplinary case. Respondent places on his letterhead that he is a certified civil trial specialist in direct contravention of Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility which in pertinent parts states that no lawyer may hold itself out as, quote, certified or a specialist. In this case, Respondent has done both.

In the Administrator's complaint, Respondent is also charged with violating two other disciplinary rules. The first being Rule 1-102(a)(1) of the Code which reads—a lawyer shall not violate a disciplinary rule. The evidence shows that Respondent wasn't cognizant when he first had this letterhead created in 1983, that there might be a violation involved with his placing the words "certified civil trial specialist" on his letterhead. Respondent did testify, though, that he was aware generally of the proscriptions of the Illinois Code of Professional Responsibility. Respondent then testified that in April of 1986, he received notice from the Commission that there may be a problem with his letterhead having to do with Rule 2-105(a)(3). As a matter of fact, I think not even a close analysis of Respondent's testimony shows that he admits that he has violated this rule by placing that on his letterhead. His defense though is that that rule is unconstitutional.

Respondent has violated the rule that says that a lawyer shall not violate a disciplinary rule by intentionally going forward and keeping this letterhead as it is and not changing it. That, the Administrator argues is a violation of the rule.

Finally and probably most importantly, Respondent has made a misleading statement in violation of Rule

2-101(b). Rule 2-101 deals with publicity and advertising. I don't feel that there's any question here that Respondent's letterhead is advertising. Too, Rule 2-101(b) in its entirety says such communication, speaking of advertising or publicity, shall contain all information necessary to make the communication not misleading and shall not contain any false or misleading statement or otherwise operate to deceive. As I stated previously, the Illinois Supreme Court has the inherent authority to regulate the practice of law. This was first held by the Court in 1899 in the case of, In Re: *Day*, 181 Ill. 73 and again 1899.

MR. SCHWIEBERT: What's that citation again?

MR. MORAN: 181 Ill., not Illinois Second, Page 73, 1899. The Court has continued to hold in disciplinary cases down through the ages and to the present that they have the inherent authority to regulate all facets of the practice of law which would also include what an attorney can advertise or what he cannot advertise.

The reason Respondent's letterhead in this case is misleading is because a member of the public or another attorney who picked up or saw Respondent's letterhead would, because they were cognizant of the inherent authority of the Supreme Court to regulate the practice of law, they would think that the Supreme Court of Illinois has put their stamp of approval on this letterhead and that Respondent would be allowed to place the term "certified civil trial specialist" on his letterhead when, in fact, the Court has never either recognized or even dealt with any certification process other than what is mentioned right now at this present time and for the past in the Illinois Code of Professional Responsibility.

In this case, as I stated previously, the Administrator is going to ask the Panel to make a specific finding, one way or another, it's a very important point in this case, whether or not the Board feels that this is misleading and we ask that either way that the Board make a specific finding in their report on this question.

As far as a recommendation for discipline is concerned in this case, the Administrator is going to recommend that Respondent be censured in this situation. This is public misconduct that should be addressed with public discipline. Respondent has testified that he has used this letterhead which is in contravention of a disciplinary rule since 1983. * * *

* * * *

APPENDIX K

EXCERPT OF HEARING TRANSCRIPT

(Pages 49-50)

Briefly summarizing what the Administrator's position on the constitutionality of this rule is, that if the Board finds that Respondent's conduct is misleading, Respondent cannot be seen to make a constitutional argument, he cannot be protected by a constitutional argument, he can't argue that the statute itself is basically unconstitutional because he can't hide behind the fact that what he's doing is misleading. He has to stand on that question and not the constitutional question.

Secondly, as discussed in the Administrator's memorandum, if the Board doesn't find that Respondent's conduct is misleading, the State can still regulate or ban certain types of lawyer advertising if the State is advancing a substantial State interest. And that the regulation or ban is closely tailored to that interest. In this case, the interest is clearly the Court's interest in having bogus certified certification groups pop up or things that you just sign in correspondence courses, things of that nature, where the certification would be meaningless. The Administrator doesn't argue either way about the meaningfulness of a certification by the National Board of Trial Advocacy, but by having a complete ban on saying attorneys are certified or specialists, that is tailoring a substantial State interest that is protecting people from either meaningless or false information by having that ban an entire ban that is the best possible remedy to the situation that is before the Court.

Again, this is pointed out more fully and discussed more fully in the Administrator's memorandum that was filed in opposition of Respondent's motion to dismiss and I would ask that the Board read that memo again.

MR. SCHWIEBERT: You have no additional cases that are not mentioned in the memo?

MR. MORAN: That's correct.

MR. SCHWIEBERT: Do you have any memorandum of cases that have been cited or briefs to file?

MR. BOSSLET: We'll get cites to the Board of those cases we referred to.

MR. SCHWIEBERT: How soon would you be sending that in?

MR. PEEL: I'm starting a malpractice trial today, probably will go seven or eight days. I think a week or two beyond that. Twenty-one days?

* * * *

No. 88-1775

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GARY E. PEEL,

Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

WILLIAM F. MORAN, III
ATTORNEY REGISTRATION AND
DISCIPLINARY COMMISSION
ONE NORTH OLD CAPITOL PLAZA
SUITE 345
SPRINGFIELD, ILLINOIS 62701
(217) 522-6838
Counsel for Respondent

May 31, 1989

QUESTIONS PRESENTED

I. Is a statement contained on an attorney's letterhead which he circulates in the ordinary course of his practice of law "commercial speech"?

II. Does the First Amendment to the Constitution of the United States permit the Supreme Court of Illinois to impose public censure on an attorney for stating on his letterhead the fact that he has been certified as a civil trial specialist by the National Board of Trial Advocacy when such a statement has been found to be inherently misleading?

III. Does the Equal Protection Clause of the Fourteenth Amendment permit the application of a blanket prohibition to Petitioner when statements concerning specialization in patent, admiralty or trademark practice are exempted from the prohibition, and when attorneys may state that they "limit their practice to" or "concentrate their practice in" civil trial advocacy?

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STATEMENT OF THE CASE[1]

As stated in Petitioner's petition, the facts of this matter are simple and undisputed.[2] In 1968, Petitioner was licensed to practice law in the State of Illinois and he is still so licensed. Hearing Transcript (H.Tr.) at 23; P.A. at 28a. In 1981, Petitioner was certified by the National Board of Trial Advocacy (NBTA) as a civil trial specialist. H.Tr. at 26; P.A. at 30a.

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[1] Respondent wishes to adopt for citation the materials printed in Petitioner's Appendices attached to his petition. Respondent will cite these materials as "P.A. at __a." Respondent will attach appendices hereto which will be cited as "R.A. at __a."

[2] See, Petition for a Writ of Certiorari to the Supreme Court of Illinois (hereinafter, "Petition"), p. 3.

Beginning in 1983 and continuing to the present, Petitioner has placed the statement "Certified Civil Trial Specialist by the National Board of Trial Advocacy" on his professional letterhead which he uses in the ordinary course of his practice of law. H.Tr. at 21; P.A. at 26a.

On or about April 15, 1986 Petitioner received a letter from the Administrator of the Attorney Registration and Disciplinary Commission (hereinafter, "the Administrator") informing him that an investigation had been initiated concerning his use of the statement "Certified Civil Trial Specialist" on his letterhead. Petitioner was apprised of the Administrator's concern that his conduct was violative of Rule 2-105(a)(3) of the

Illinois Code of Professional Responsibility (Petition, pp. 2, 3). Petitioner was requested to respond, in writing, concerning his position on this matter.[3] Respondent responded to this letter on April 28, 1989. P.A. at 22a - 24a.

On April 9, 1987 the Administrator filed a complaint against Petitioner with the Hearing Board of the Attorney Registration and Disciplinary Commission alleging, in part, that Petitioner's letterhead violated Rule 2-105(a)(3). R.A. at 3a. On August 25, 1987 the Hearing Board issued its report. The Board found that Petitioner had violated Rule 2-105(a)(3) and held additionally,

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[3] H.Tr. at 19; R.A. at 1a. A reproduction of the Administrator's letter addressed to Petitioner dated April 15, 1986 is attached as an Appendix hereto, R.A. at 2a.

"[Petitioner's conduct] is 'misleading' as our Supreme Court has never recognized or approved any certification process." The Board recommended that Petitioner be publicly censured. P.A. at 20a.

Petitioner filed exceptions to the report of the Hearing Board, and on February 17, 1989 the Review Board of the Attorney Registration and Disciplinary Commission[4] filed a report concurring with the findings of fact and conclusions of law of the Hearing Board and recommending that Petitioner be publicly censured. P.A. at 16a.

Petitioner filed exceptions to the report and recommendation of the Review Board with the Supreme Court of

[4] The Review Board is the appellate board of the Attorney Registration and Disciplinary Commission. The parties may seek, as a matter of right, the review of any recommendation of the Hearing Board. See, 107 Ill.2d R 753(e).

Illinois.[5] On February 2, 1989 the Supreme Court of Illinois issued its opinion in this matter.[6] The Court rejected Petitioner's First Amendment (P.A. at 8a) and Equal Protection (P.A. at 14a) arguments and ordered that Petitioner be publicly censured for his violation of Rule 2-105(a)(3). P.A. at 15a. The Court found that Petitioner's conduct was misleading for two reasons, the first being:

> [T]he claim of certification by the NBTA impinges upon the sole authority of this court to license attorneys in this State and is misleading because of the similarity between the words "licensed" and

[5] An attorney may appeal a decision of the Review Board as a matter of right, if that decision concludes that disciplinary action is required. See, 107 Ill.2d R 753(e)(4) and (5).

[6] The Supreme Court of Illinois has the inherent authority to regulate the practice of law in Illinois and to discipline attorneys who have been admitted to the practice. See, In re Mitan (1979), 75 Ill.2d 118, 378 N.E. 2d 278, cert. denied, 444 U.S. 916 (1979).

"certified" . . . Indeed, it is apparent from the foregoing that the general public could be misled to believe that [Petitioner] may practice in the field of trial advocacy solely because he is certified by the NBTA. P.A. at 9a.

The second reason the Court found Petitioner's conduct to be misleading was:

> [T]he claim that [Petitioner] is certified by the NBTA is misleading because it tacitly attests to the qualifications of [Petitioner] as a civil trial advocate. P.A. at 9a.

Interestingly, though Petitioner claims the bona fides of the NBTA are without question,[7] the Court found that:

> [N]one of the briefs filed in support of [Petitioner] agree as to what standards an attorney must meet to receive certification from the NBTA. In the respondent's brief, it is stated that, "[t]o obtain certification by the National Board of Trial Advocacy, an attorney must have * * * acted as lead counsel in at least 40 jury trials carried to verdict, or 100 non-jury matters tried to conclusion, successfully

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[7] See, Petition, p. 19.

> score on a six-hour written examination, maintain continuing participation in continuing legal education, and obtained other standards and achievements." The Association of Trial Lawyers of America filed an amicus brief in which it is stated that the primary requirements for certification "are that the attorney have at least five years experience in civil practice, including experience as lead counsel in at least 15 major cases tried to verdict." The National Board of Trial Advocacy also filed an amicus brief, in which it is stated that, to be certified, an attorney must "have appeared as lead counsel in not less than 15 complete trials of civil matters to verdict or judgment, including not less than 45 days of full trial; at least five of these trials must be to a jury. In addition, applicants must have appeared as lead counsel in at least forty additional contested matters involving the taking of testimony. These may include trials, evidentiary hearings, depositions, or motions heard before or after trial." Does certification mean that the attorney has tried 40, 15, or 5 jury trials to verdict? Does the requirement concerning 40 contested matters refer to 40 jury cases tried to verdict, as the respondent asserts, or simply 40 hearings on motions, depositions and

nonjury trials, as the National Board of Trial Advocacy claims? If certification conveys such a varied and uncertain understanding as to its meaning to the attorneys who are in this case contending for the cause of certification, and who should be knowledgeable as to its meaning, how much more confusing is the statement that an attorney is certified as a trial specialist likely to be to the general public? P.A. at 10-11a.

SUMMARY OF ARGUMENT

Petitioner is engaging in "commercial speech" when he places the statement "Certified Civil Trial Specialist by the National Board of Trial Advocacy" on his professional letterhead which he circulates during the ordinary course of his practice of law. Petitioner can be publicly censured for including this statement on his letterhead because such a statement is inherently misleading and this Court has held that the States may prohibit misleading statements.

In addition, the decision of the Supreme Court of Illinois is not in conflict with the decisions of two other State Supreme Courts, because the record in this matter is different, and Petitioner's conduct was found to be

misleading at all three levels of review.

Finally, statements concerning specialization in patent, admiralty or trademark practice are permissibly exempted from prohibition because the State has a substantial interest in allowing attorneys engaged in these areas of practice to publicize these facts. The State may also permissibly allow an attorney to state that they "limit their practice to" or "concentrate their practice in" civil trial advocacy because the terms "limit" and "concentrate" are not inherently misleading, as opposed to the term "certified", and do not relate to the quality of services the attorney provides.

For these reasons, this Court should deny Petitioner's request for a Writ of Certiorari to the Supreme Court of Illinois.

REASONS FOR DENYING THE WRIT

I. A STATEMENT CONTAINED ON PETITIONER'S LETTERHEAD WHICH HE CIRCULATES IN THE ORDINARY COURSE OF HIS PRACTICE OF LAW IS "COMMERCIAL SPEECH".

Petitioner has waived review of the question of whether his statement is "commercial speech" because neither Petitioner or the various amici who filed briefs on his behalf have raised this issue below. This Court has held that review is limited to the specific Federal questions that were properly presented in the state court. Whitney v. California, 274 U.S. 357, 362-363 (1927).

As admitted by Petitioner,[8] whether Petitioner's statement is "commercial speech" is a Federal question. Petitioner has not previously raised this question. Therefore, this issue is waived. Regardless, there can be no question that Petitioner's statement is "commercial speech."

Petitioner's statement is a form of attorney advertising. Beginning with this Court's decision in Bates v. State Bar of Arizona,[9] attorney advertising has been held to be commercial speech.

This Court has held that commercial speech doctrine rests heavily on the "common sense" distinction between speech

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[8] See, Petition, p. 8.

[9] 433 U.S. 350 (1977).

proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. Ohralik v. Ohio State Bar Association, 436 U.S. 447, 455-456 (1978). Common sense dictates that Petitioner's statement proposes a commercial transaction or the continuation of an ongoing commercial relationship.

At hearing, Petitioner testified that he circulates his letterhead with the certification statement during the ordinary course of his practice of law. Petitioner's statement is sent to fellow attorneys, whose referrals constitute a substantial portion of Petitioner's legal business,[10] opposing litigants and

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[10] See, Petition, p. 17.

Petitioner's clients. Petitioner's holding himself out to these individuals as being a certified civil trial specialist, as well as indicating that he is officially licensed to practice law in Illinois, Missouri and Arizona, is for the purpose of informing these individuals that Petitioner believes he is a better qualified attorney because he has been certified by the NBTA.

This Court has held that, "[C]commercial speech serves to inform the public of the availability, nature and prices of products and services." Bates v. State Bar of Arizona, 433 U.S. 433, 364 (1977). Petitioner's statement informs the public of the nature of his services. Petitioner's statement is commercial speech as defined by this Court.

II. THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT PROHIBIT THE SUPREME COURT OF ILLINOIS FROM IMPOSING PUBLIC CENSURE ON PETITIONER FOR STATING ON HIS LETTERHEAD THE FACT THAT HE HAS BEEN CERTIFIED AS A CIVIL TRIAL SPECIALIST BY THE NATIONAL BOARD OF TRIAL ADVOCACY BECAUSE SUCH A STATEMENT HAS BEEN FOUND TO BE INHERENTLY MISLEADING.

A. THIS COURT SHOULD NOT DISTURB THE SUPREME COURT OF ILLINOIS' DECISION TO IMPOSE PUBLIC CENSURE ON PETITIONER BECAUSE HIS STATEMENT IS INHERENTLY MISLEADING AND THE STATE MAY PROHIBIT INHERENTLY MISLEADING STATEMENTS.

"Advertising that is false, deceptive, or misleading of course is subject to restraint." Bates v. State Bar of Arizona, 433 U.S. at 383. "Misleading advertising may be prohibited entirely." In re R.M.J., 455 U.S. 191, 203 (1982). Petitioner's statement was found to be misleading at all three levels of review on the state level. This finding is not against the manifest weight of the evidence contained in the record or a clear error of law. Therefore, the Supreme Court of Illinois can permissibly prohibit Petitioner from holding himself out through his letterhead as being a "Certified Civil Trial Specialist by the National Board of Trial Advocacy."

There is no question that Petitioner's conduct is violative of Rule 2-105(a)(3) of the Illinois Code of

Professional Responsibility. Petitioner's statement can constitutionally be prohibited because it is misleading.

Petitioner's statement is misleading, as found by the Supreme Court of Illinois, for two reasons. First:

> [T]he claim of certification by the NBTA impinges upon the sole authority of this court to license attorneys in this State and is misleading because of the similarity between the words "licensed" and "certified". Webster's dictionary defines "certificate" as "a document containing a certified and usually official statement * * * , especially: a document issued by * * * a state agency * * * certifying that one has satisfactorily * * * attained professional standing in a given field and may officially practice or hold a position in that field." (Emphasis added.) (Webster's Third New International Dictionary 366 (1986)). A "license" is defined by Webster's as "a right or permission granted * * * by a competent authority to engage in a business or occupation * * * or to engage in some transaction which but for such license would be unlawful." (Emphasis added.) (Webster's Third New International Dictionary 1304 (1986)). Indeed, it is apparent

> from the foregoing that the general public could be misled to believe that [Petitioner] may practice in the field of trial advocacy solely because he is certified by the NBTA. In [Petitioner's] letterhead, which we have set out above, directly below the statement concerning certification is the following: "Licensed: Illinois, Missouri, Arizona." The letterhead contains no indication that the licensure was by official organizations which had authority to license, whereas the certification was by an unofficial group and was purely a voluntary matter. In re Peel (1989), 126 Ill.2d 397, 405-406; P.A. at 9a.

Secondly, the Illinois Court found:

> [T]he claim that [Petitioner] is certified as a civil trial specialist by the NBTA is misleading because it tacitly attests to the qualifications of [Petitioner] as a civil trial advocate. Because not all attorneys licensed to practice law in Illinois are certified by the NBTA, the assertion is tantamount to a claim of superiority by those attorneys who are certified. 126 Ill.2d at 406; P.A. at 9a.

These findings are clearly consistent with the record in this matter and are not indicative of a clear error of law. Both reasons given by the Court would sustain a prohibition of Petitioner's statement.

As to the first reason, the Court's well-reasoned analysis needs little explanation. Petitioner's statement would be confusing to the public, as there is no explanation that the certification is not "official", therefore, in its present form, Petitioner's statement is inherently misleading. There is no need to show that any individual was actually misled, the State can simply prohibit Petitioner's conduct because of the inherently misleading content of his statement. See, e.g., Zauderer v. Office of Disciplinary Counsel, 471. U.S. 626 (1985).

As to the second reason, the Court found that Petitioner's statement is, in effect, a statement as to the quality of the legal services he provides. This Court has held that claims as to the

quality of legal services "are not susceptible of measurement or verification; accordingly, such claims may be so likely to mislead the public as to warrant restriction." Bates v. State Bar of Arizona, 433 U.S. at 383. Petitioner's statement relates to the quality of services he provides. Therefore, the State can prohibit Petitioner from including the statement on his letterhead.

B. THE DECISION BELOW CAN BE DISTINGUISHED FROM THE DECISIONS OF TWO OTHER STATE SUPREME COURTS, BOTH OF WHICH HELD THAT ON THE RECORD BEFORE THEM THE STATE COULD NOT PROHIBIT AN ATTORNEY FROM HOLDING HIMSELF OUT AS BEING A CERTIFIED CIVIL TRIAL SPECIALIST BY THE NATIONAL BOARD OF TRIAL ADVOCACY BECAUSE THE RECORD IN THIS MATTER IS DIFFERENT AND PETITIONER'S CONDUCT WAS FOUND TO BE MISLEADING AT ALL THREE LEVELS OF REVIEW.

This case is not a situation where this Court should grant a Writ of Certiorari pursuant to Rule 17(1)(c) of the Rules of Practice of the Supreme Court of the United States because the decision of the Supreme Court of Illinois

can be distinguished from the decisions of the Minnesota and Alabama Supreme Courts.

In Minnesota, the Court was presented with a record where the advisory boards of their disciplinary system found that an attorney holding himself out as a "Civil Trial Specialist by the National Board of Trial Advocacy", had not engaged in misleading or deceptive conduct. In re Johnson (Minn. 1983), 341 N.W.2d 282, 283. Based on this finding, the Minnesota Court found that "there is no basis for upholding the rule in this case." 341 N.W.2d at 285.

The Minnesota Court found that "Members of the general public could be misled by claims of specialization when no guidelines for specialization in the profession have been drawn," but the court felt that they were bound by their

lower boards' decisions. 341 N.W.2d at 285. In addition, the Minnesota Court found, "NBTA applies a vigorous and exacting set of standards and examinations on a national scale before certifying a lawyer as a trial specialist." 341 N.W.2d at 283.

In the case at bar, the Hearing and Review Boards of the Illinois disciplinary system and the Supreme Court of Illinois all found that such a statement was deceptive and inherently misleading. The Illinois Court also found that on the face of the record in Illinois, the standards to be certified by the NBTA were unclear. In re Peel (1989), 126 Ill.2d 397, 406-407. These findings are not against the manifest weight of the evidence or a clear error of law.

The Minnesota Court's decision was based on a dissimilar record. In addition, Petitioner's conduct was found to be misleading at all three levels of review. The decisions of the Illinois and Minnesota Courts can be distinguished on these bases.

The Supreme Court of Alabama found when presented with a situation where an attorney sought to hold himself out as being certified by the NBTA that:

> [I]t appears to us that a certification of specialty by the NBTA would indicate a level of expertise with regard to trial advocacy in excess of the level of expertise required for admission to the bar generally. We conclude, therefore, that Howell's proposed advertisement of certification by the NBTA as a civil trial advocate would not be misleading or deceptive on its face. Ex Parte Howell (1986), 487 So.2d 848, 851.

Again, the record in Illinois is different than that of Alabama. The Illinois Court could not discern what the qualifications to be certified by the

NBTA were. Therefore, no level of expertise could be determined. In fact, the Illinois Court specifically found that because the attorneys involved in the case could not figure out what the qualifications to be certified by the Board were, "how much more confusing is the statement . . . likely to be to the public?" 126 Ill.2d at 407.

The decision of the Alabama Court can be distinguished based on the fact that the record created in Illinois is different and the Illinois decision is based on the finding that Petitioner's conduct was found to be misleading at all three levels of review.

This Court should not grant Petitioner's request for a Writ of Certiorari based on the consideration set forth in Rule 17(1)(c), supra, because the conflicting decisions of the highest courts of two sister States can be distinguished.

III. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES PERMITS A BLANKET PROHIBITION TO PETITIONER WHEN STATEMENTS CONCERNING SPECIALIZATION IN PATENT, ADMIRALTY OR TRADEMARK PRACTICE ARE EXEMPTED FROM THE PROHIBITION, AND WHEN ATTORNEYS MAY STATE THAT THEY "LIMIT THEIR PRACTICE TO" OR "CONCENTRATE THEIR PRACTICE IN" CIVIL TRIAL ADVOCACY.

A. STATEMENTS CONCERNING SPECIALIZATION IN PATENT, ADMIRALTY OR TRADEMARK PRACTICE ARE PERMISSIBLY EXEMPTED FROM PROHIBITION BECAUSE THE STATE HAS A SUBSTANTIAL INTEREST IN ALLOWING ATTORNEYS ENGAGED IN THESE AREAS OF PRACTICE TO PUBLICIZE THAT FACT.

The Supreme Court of Illinois is advancing a substantial State interest by allowing attorneys to publicize the fact that they specialize in patent, admiralty or trademark law. Petitioner's argument that his statement concerning NBTA certification is indistinguishable[11] from statements concerning specialization in patent, admiralty or trademark law is without merit.

This Court has held, "[T]he State lawfully may regulate only to the extent regulation furthers the State's substantial interest." In re R.M.J., 455 U.S. at 203. The substantial interest in allowing attorneys to hold themselves out as specialists in patent, admiralty and trademark law is that the general public

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11 See, Petition, p. 24.

has historically had difficulty in finding attorneys who practice in such fields. In re Peel, 126 Ill.2d at 411.

In discussing a situation where an attorney filed suit to be allowed to hold himself out as a patent attorney, though this argument could apply to the areas of admiralty and trademark law as well, the United States Court of Appeals for the Fifth Circuit stated:

> [T]here is a valid reason for permitting the patent attorney to indicate his specialty in an appropriate manner, such as in classified telephone directories. In most areas of this Country such attorneys are few and far between. No public interest is to be served, rather it would be hampered, by requiring a citizen to search from office to office, from city to city, like looking for a needle in the haystack, until, at last, he eventually might find a patent attorney. Silverman v. State Bar of Texas, 405 F.2d 410, 414 (5th Cir. 1968).

This statement, in a very straightforward and practical manner,

sets forth the State's interest in allowing attorneys to hold themselves out as specialists in the areas of patent, admiralty and trademark law.

Additionally, Petitioner's statement is distinguishable because he is holding himself out as being "certified" and a "specialist". The rules allowing patent, admiralty and trademark attorneys to hold themselves out as specialists in these fields do not allow them to use these inherently misleading terms.

Rules 2-105(a)(1) and (2) of the Illinois Code of Professional Responsibility (107 Ill.2d R 2-105(a)(1) and (2); Petition, pp. 2 - 3), provide:

> (a) A lawyer shall not hold himself out publicly as a specialist, except as follows:
>
> (1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney" or any combination of those terms, on his letterhead and office sign.

> (2) A lawyer engaged in the trademark practice may use the designation "Trademarks," "Trademark Attorney" or "Trademark Lawyer," or a combination of those terms, and a lawyer engaged in the admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or "Admiralty Lawyer," or a combination of those terms, in any form of communication otherwise permitted under Rules 2-101 through 2-104. (See, 107 Ill.2d R 2-101 through 2-104, the rules outlining permissible advertising in Illinois.)

In compliance with the decisions of this Court, these rules are restrictive and narrowly drawn, while still advancing the State's substantial interest in allowing attorneys who practice in these fields to communicate these facts to prospective clients. See, e.g., In re R.M.J., 455 U.S. at 203. Therefore, the exceptions contained in the above rules are constitutionally acceptable.

B. THE STATE MAY PERMISSIBLY ALLOW AN ATTORNEY TO STATE THAT THEY "LIMIT THEIR PRACTICE TO" OR "CONCENTRATE THEIR PRACTICE IN" CIVIL TRIAL ADVOCACY, WHILE PROHIBITING STATEMENTS CONCERNING "CERTIFICATION" AND "SPECIALIZATION", BECAUSE THE TERMS "CONCENTRATE" AND "LIMIT" ARE NOT INHERENTLY MISLEADING AND DO NOT RELATE TO THE QUALITY OF THE SERVICES THE ATTORNEY PROVIDES.

The terms "limit" and "concentrate" are not inherently misleading as they do not convey a secondary meaning to the public, such as the terms "certified" and "specialist". See, In re Peel, 126 Ill.2d at 410. In addition, these terms do not relate to the quality of the services an attorney provides.

These terms simply indicate the areas in which an attorney will accept employment. The terms "limit" and "concentrate" allow attorneys to convey useful, meaningful and nonmisleading information to the public. In a draft of the American Bar Associatin Standing Committee on Ethics and Professional Responsibility Report to the House of Delegates (Draft Report), dated August 29, 1988, when discussing whether the comments to Rule 7.4 of the A.B.A. Model Rules should contain restrictions on attorneys stating that they "limit" or "concentrate" their practice in certain areas, the Draft Report states:

> In view of the desirability of promoting accurate communication by lawyers concerning their services and experience, absolute prohibition of the phrases 'limited to' and 'concentrated in' is unwarranted. These phrases can provide valuable information to a consumer. Unlike the terms 'specialist,' 'practices a specialty' and 'specializes in,' the

> phrases 'limited to' and 'concentrated in' lack the clear implication of formal recognition of a specialist.

For these reasons, the State may constitutionally allow an attorney to state that they "limit their practice to" or "concentrate their practice in" an area of law, while prohibiting statements concerning "certification" and "specialization."

CONCLUSION

This Court has held, "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the Court'." Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1985). In furthermore of this great interest, the Supreme Court of Illinois has promulgated and enforced the rules in question.

The rules in question are constitionally sound. Petitioner's rights under the Constitution of the United States have not been violated. There is no Federal question which this Court needs to address. Therefore, this Court should deny Petitioner's Petition for a Writ of Certiorari to the Supreme Court of Illinois.

Respectfully submitted,

William F. Moran, III
Attorney Registration and
Disciplinary Commission
of Illinois
One North Old Capitol Plaza
Suite 345
Springfield, Illinois 62701
(217) 522-6838

Counsel for Respondent

May 31, 1989

APPENDICES

INDEX TO APPENDICES

APPENDIX A

EXCERPT OF HEARING TRANSCRIPT

(Page 19)

* * * *

MR. MORAN: I'll show you what's been marked as Administrator's Exhibit Number 2 for identification. Could you identify this, please.

MR. PEEL: Yes. That's a copy of the letter I received from the Attorney's Registration and Disciplinary Commission under date of April 15, 1986, indicating that there was an opinion by the Administrator that my letterhead may be in violation of Rule 2-105(a)(3) and requested a response to the letter within 14 days.

MR. MORAN: Did you receive what would have been the original of this letter?

MR. PEEL: Yes, I did, although I don't recall whether the attached exhibit in your exhibit came with the letter. It may have, but I don't recall.

* * * *

APPENDIX B

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION
of the
SUPREME COURT OF ILLINOIS

Gary E. Peel
Attorney at Law
40 Edwardsville Professional Park
Edwardsville, Illinois 62025

Springfield
April 15, 1986

Re: Gary E. Peel
at the charge of
the Administrator
No. 86-SI-3301

Dear Mr. Peel:

The Administrator of the Attorney Registration and Disciplinary Commission pursuant to Rule 51 of the Rules of the Attorney Registration and Disciplinary Commission has opened an investigation into your use of the words "Certified Civil Trial Specialist" on your letterhead. A copy of the letterhead in question is attached [See, P.A. at 21a].

The Administrator feels that your letterhead may be in violation of Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility. Please write to the undersigned within fourteen days outlining your position concerning this matter.

Thank you for your cooperation.

Very truly yours,

William F. Moran, III
Counsel

WFM:tip
Enclosure

APPENDIX C

BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

Administrator's No. 87 SH 76

IN THE MATTER OF: GARY E. PEEL,
Attorney-Respondent,

No. 2166259

COMPLAINT

[Filed April 9, 1987]

Carl H. Rolewick, Administrator of the Attorney Registration and Disciplinary Commission by his his attorney William F. Moran, III, complains of Respondent Gary E. Peel and alleges that Respondent, who was licensed to practice law in Illinois on November 14, 1968 and is still so licensed, has been guilty of conduct which tends to bring the courts and the legal profession into disrepute as follows:

1. On or before April 15, 1986 Respondent had stationary [sic] created for use in his practice of law. The letterhead on this stationary [sic] holds Respondent out as a "Certified Civil Trial Specialist by the National Board of Trial Advocacy." A copy of this stationary [sic] is attached as Exhibit 1 (See, P.A. at 21a).

2. Between April 15, 1986 and the date the Inquiry Board voted a complaint in this matter, Respondent used the above stationary [sic] in the ordinary course of his practice of law.

3. At no time has the Supreme Court of Illinois recognized any certification by the National Board of Trial Advocacy.

4. Respondent's conduct set forth above constitutes:

a. violating a disciplinary rule in violation of Rule 1-102(a)(1) of the Illinois Code of Professional Responsibility;

b. a false or misleading statement in violation of Rule 2-101(b); and

c. publicly holding himself out as a certified legal specialist in violation of Rule 2-105(a)(3).

WHEREFORE, the Administrator prays that this cause be assigned to a hearing panel of the Hearing Board, that a hearing be conducted, that the panel make findings of fact and conclusions of fact and law and a recommendation for such discipline and costs as is warranted.

Carl H. Rolewick, Administrator
Illinois Attorney Registration and
Disciplinary Commission

By: /s/ William F. Moran, III
Counsel for the Administrator

William F. Moran, III, Counsel
Attorney Registration and
Disciplinary Commission
One North Old Capitol Plaza, #345
Springfield, Illinois 62701
Telephone: (217) 522-6838

No. 88-1775

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

GARY E. PEEL,

Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE NATIONAL BOARD OF TRIAL ADVOCACY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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* Counsel of Record

June 1, 1989

No. 88-1775

IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Board of Trial Advocacy hereby moves for leave to file the attached brief *amicus curiae* in support of the Petition for a Writ of Certiorari in this case. The consent of the petitioner has been obtained. The consent of the respondent was requested but refused. The National Board of Trial Advocacy was permitted to participate as *amicus curiae* in this case in the Illinois Supreme Court, over the opposition of respondent.

STATEMENT OF INTEREST

This case involves the professional discipline of an attorney, petitioner Gary E. Peel, by the respondent Attorney Registration and Disciplinary Commission of Illinois, for indicating on his letterhead that he is a "Certified Civil Trial Specialist By the National Board of Trial Advocacy." Petitioner has sought review by this Court because

this decision conflicts with this Court's decisions regarding the First Amendment rights of attorneys to convey and of the public to receive truthful and non-deceptive information concerning the qualifications of a lawyer and because it conflicts with the holdings of the Supreme Courts of two other states, Minnesota and Alabama, on this precise issue — the public statement of certification by the National Board of Trial Advocacy.

The National Board of Trial Advocacy was founded eleven years ago for the purpose of providing rigorous, objective criteria for the certification of Civil or Criminal Trial Specialists in the legal profession. The Board was organized following the model in the medical profession, where physicians may become Board Certified in their specialty. The purpose for such specialty certification is not only to improve the legal profession by providing substantial standards to which trial lawyers may aspire, but also to improve the delivery of legal services to the public by providing an objective, verifiable measure of experience and ability in the specialty, so that the choice of an attorney may be more fully informed.

The National Board of Trial Advocacy has been endorsed by and is sponsored by several well-respected major national organizations of lawyers who are interested in the quality of the trial bar: American Board of Professional Liability Attorneys, Association of Trial Lawyers of America, International Academy of Trial Lawyers, International Society of Barristers, National Association of Criminal Defense Lawyers, National Association of Women Lawyers and the National District Attorneys Association. In addition, the Board of Directors and Honorary Board of the National Board of Trial Advocacy includes a large number of well-respected trial lawyers throughout the nation, as well as four United States District Court Judges, one United States Court of Appeals Judge, and two State Supreme Court Justices, two law school professors and one law school dean.

The National Board of Trial Advocacy has certified over 1,000 civil or criminal trial specialists in all 50 states, the District of Columbia and the Virgin Islands. The ability of these 1,000 certified trial specialists to inform the public of their certification is central to the purpose for certification and the National Board of Trial Advocacy. The National Board of Trial Advocacy and its members, therefore, have a strong interest in supporting the right of these lawyers to indicate the true and accurate fact of their certification in their stationary and/or in any advertising.

REASON FOR AMICUS CURIAE BRIEF

Central to the determination of whether this Court should grant certiorari are two issues: whether certification by the National Board of Trial Advocacy is meaningful, so that its communication to the public would be non-deceptive; and whether there is substantial disagreement among the states of the propriety of publicly communicating certification by the National Board of Trial Advocacy. The National Board of Trial Advocacy is in a unique position to inform the court of the nature of its certification process, its standards and reliability, so that the Court may properly understand the significance and meaning of a lawyer's certification as a Criminal or Civil Trial Specialist by the National Board of Trial Advocacy. In addition, the National Board of Trial Advocacy is in a unique position to inform the Court of the various ways the states have permitted or prohibited the public statement of certification by the National Board of Trial Advocacy.

CONCLUSION

Because it is in a unique position to inform this Court of the nature and meaning of its certification, and because it has a strong interest in the outcome of the case, the National Board of Trial Advocacy respectfully requests leave to file an *amicus curiae* brief in support of the petition for a writ of certiorari in this case.

Respectfully submitted,
NATIONAL BOARD OF TRIAL ADVOCACY

by its attorney,

Timothy Wilton
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Executive Director

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BRIEF OF THE NATIONAL BOARD OF TRIAL ADVOCACY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST

Please see the Motion for Leave to file Brief *Amicus Curiae, supra,* for the Statement of Interest of the National Board of Trial Advocacy in this case.

REASONS FOR GRANTING THE WRIT

Introduction

This case involves the professional discipline by the Illinois Attorney Registration and Disciplinary Commission of Gary Peel, an Illinois attorney, for indicating on his office letterhead that he is a "Certified Civil Trial Specialist By the National Board of Trial Advocacy." There is no contention that this statement is false; Mr. Peel in fact met the extensive and demanding concentration,

experience, education and peer review standards, passed the six hour written examination required for certification by the National Board of Trial Advocacy and was certified as a Civil Trial Specialist on September 1, 1981. Certification by the National Board of Trial Advocacy is reviewed every five years, and Mr. Peel again satisfied the experience, concentration, education and peer review requirements and was recertified on September 1, 1986.

There is also no dispute that Mr. Peel indicated the fact of his certification on his office letterhead, and that such an action is in apparent conflict with Illinois Disciplinary Rule (DR) 2-105. This rule was patterned after one recommended to the States by the American Bar Association in its Model Code of Professional Responsibility, and continues to be recommended in substantially similar form as ABA Model Rule of Professional Conduct 7.4. Many states throughout the country apply DR 2-105 or Model Rule 7.4, though others have created exceptions for lawyers certified by State certification programs or by the National Board of Trial Advocacy,[1] and still others have simply deleted Model Rule 7.4 when adopting the Model Rules.[2]

As applied to certification by the National Board of Trial Advocacy, however, DR 2-105 conflicts with the First Amendment right of a lawyer to convey, and of the public to receive, truthful, relevant, and helpful information which will assist the public in making an informed choice of an attorney. This Court has held that advertising by a lawyer is "commercial speech" protected by the First Amendment and cannot be banned, but may only be regulated to the extent

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1. States which have their own certification plans include: Arizona, Arkansas, California, Florida, Louisiana, New Jersey, New Mexico, North Carolina, South Carolina, Texas, and Utah. Most of these certify only two or three specialties. Specialists in non-certified areas apparently are prohibited from indicating their specialization. States which have formally approved National Board of Trial Advocacy certification include: Alabama, Connecticut, Georgia and Minnesota.

2. States which have adopted the Model Rules, but deleted Rule 7.4 include: Kansas, Michigan, North Dakota, and Wyoming. Oklahoma and Rhode Island also have no specific rule on specialties, requiring only that such communications not be misleading. Montana has amended Model Rule 7.4 to permit statements of specialization where a lawyer "is a specialist in a certain field of law by experience in the field, by specialized training or education in the field, or by certification by an authoritative professional entity in the field."

necessary to insure that it is not false or deceptive.

Part I of this brief will demonstrate that a factually accurate statement by a lawyer that he is certified as a Civil Trial Specialist by the National Board of Trial Advocacy is not deceptive. That section will describe the National Board of Trial Advocacy, the rigorous and objective standards which must be met by an applicant attorney, and the process by which an attorney may become certified. From this description, it will become clear that an attorney who has met these standards in fact possesses experience and a special competence beyond that which is required for admission to the bar. A true statement of an attorney's certification, therefore, is not deceptive and would not mislead the public but would instead provide it with truthful, relevant information which is helpful in the selection of an attorney.

Part II will discuss how other states have treated the National Board of Trial Advocacy. The Supreme Courts of Minnesota and Alabama have declared their disciplinary rules, which were similar to Illinois' DR 2-105, to be unconstitutional as applied to National Board of Trial Advocacy certification, because they interfered with the certified attorney's First Amendment right to convey truthful, accurate and non-deceptive information to the public. No court has held to the contrary, other than Illinois in this case. Other states have amended their ethical rules to permit a statement of specialty certification so long as the lawyer is certified by an approved agency with substantial standards. The National Board of Trial Advocacy is an approved agency in those states.

The National Board of Trial Advocacy suggests, therefore, that this Court should grant the writ of certiorari and hold that it is improper to discipline an attorney for stating the true fact of his National Board of Trial Advocacy certification, and that DR 2-105, as applied to National Board of Trial Advocacy certification, is unconstitutional. Illinois may then choose, as the Supreme Courts of Minnesota and Alabama did, to form a committee to approve valid certification agencies like the National Board of Trial Advocacy. The First Amendment probably permits such limited regulation designed to insure that the public is not deceived, but the complete ban on communicating National Board of Trial Advocacy certification cannot stand.

I. THE STATEMENT THAT A LAWYER IS CERTIFIED AS A CIVIL TRIAL SPECIALIST BY THE NATIONAL BOARD OF TRIAL ADVOCACY PROVIDES ACCURATE, MEANINGFUL AND HELPFUL INFORMATION TO THE PUBLIC AND IS NOT MISLEADING OR DECEPTIVE BECAUSE THE NATIONAL BOARD OF TRIAL ADVOCACY IS A WELL-RESPECTED, REPUTABLE AGENCY WHICH APPLIES OBJECTIVE, VERIFIABLE, RIGOROUS AND MEANINGFUL STANDARDS IN ITS CERTIFICATION PROCESS.

The National Board of Trial Advocacy was established in 1977 as a direct result of the Roscoe Pound — American Trial Lawyers Foundation Conference on Trial Specialty held in 1976. Its purpose was twofold. First, the National Board of Trial Advocacy sought to improve the quality of the trial bar by creating rigorous standards for certification to which lawyers could aspire. Second, the National Board of Trial Advocacy sought to improve the delivery of legal services to the public by providing an objective, verifiable measure of experience, ability and concentration in civil or criminal trial advocacy so that the public's choice of a lawyer for that type of case could be made in an informed manner. To these ends, the National Board of Trial Advocacy created a credentialling process along the lines followed in the medical profession for Board Certification. The National Board of Trial Advocacy program is national in scope, with substantial, meaningful criteria to insure that certified lawyers in fact have the special competence in their field of trial advocacy so that they may accurately be described as Civil or Criminal Trial Specialists.

The National Board of Trial Advocacy is endorsed in both its purposes and its program by seven well respected national organizations of lawyers and judges which are concerned with the quality of legal services in the trial advocacy area. They are:

American Board of Professional Liability Attorneys
Association of Trial Lawyers of America
International Academy of Trial Lawyers
International Society of Barristers
National Association of Criminal Defense Lawyers
National Association of Women Lawyers
National District Attorneys Association

Each of these organizations, by their institutional sponsorship of the National Board of Trial Advocacy, has determined: (1) that the quality of the trial bar will be enhanced by the establishment of rigorous standards to which lawyers can aspire; (2) that the public interest in an informed selection of an attorney will be served by the creation of a credentialling program through which experienced and able trial specialists can be identified; and (3) that the National Board of Trial Advocacy standards and its certification process effectuate those goals.

The National Board of Trial Advocacy program is supervised and directed by a most distinguished group of lawyers, judges and legal educators. A complete listing of the achievements and honors of the 20 member Board of Directors and 20 member Honorary Board would cause this brief to exceed the allotted page limitations, but a brief description of some of the board members will help this court to understand the nature and quality of the National Board of Trial Advocacy program.

President and Chairman of the Board, J.D. Lee of Knoxville, Tennessee, has served as President of the Association of Trial Lawyers of America, President of the Trial Lawyers for Public Justice, President of the Tennessee Trial Lawyers Association, and President of the Tennessee Constitutional Convention. He is a Fellow of the International Society of Barristers and a Fellow and member of the Board of Directors of the International Academy of Trial Lawyers. Mr. Lee has authored four books and numerous articles on trial advocacy.

Founder and former Chairman of the Board, Theodore I. Koskoff of Bridgeport, Connecticut has served as President of the Association of Trial Lawyers of America, President of the Roscoe Pound - American Trial Lawyers Foundation, and President of the Connecticut Trial Lawyers Association. Until his recent death, Mr. Koskoff continued his relationship with the National Board of Trial Advocacy as Of Counsel to the Board.

Among the lawyer members of the Board are six former Presidents of the Association of Trial Lawyers of America, including J.D. Lee, as well as: Scott Baldwin from Marshall, Texas; Jacob D. Fuchsberg from New York, New York; Richard F. Gerry from San Diego, California; Robert L. Habush from Milwaukee, Wisconsin; and David S. Schrager from Philadelphia, Pennsylvania.

Two former Presidents of the International Academy of Trial Lawyers serve on the Board: Walter H. Beckham, Jr., from Miami, Florida; and Lee S. Kreindler from New York, New York. Other Board members who have served as President of major national and international trial lawyer organizations include: Kenneth S. Broun from Raleigh, North Carolina, former Director of the National Institute for Trial Advocacy (and former Dean of the University of North Carolina Law School); Judge Jim R. Carrigan from Denver, Colorado, former Director of the National Institute for Trial Advocacy; Joseph H. Cummins from Los Angeles, California, former President of the American Board of Trial Advocates; Mary Jo Cusack from Columbus, Ohio, former President of the National Association of Women Lawyers; Gerald S. Gold from Cleveland, Ohio, former President of the National Association of Criminal Defense Lawyers; Samuel Shore from Los Angeles, California, former President of the American Board of Professional Liability Attorneys, and Craig Spangenberg, of Cleveland, Ohio, former President of the International Society of Barristers and former Dean of the International Academy of Trial Lawyers.

Included among the Board of the National Board of Trial Advocacy are a number of distinguished judges and former judges. They include: Douglas K. Amdahl, Chief Justice of the Minnesota Supreme Court; Jim R. Carrigan, United States District Judge, District of Colorado, formerly Justice of the Colorado Supreme Court (and former Professor of Law at the University of Colorado Law School); William H. Erickson, Justice of the Colorado Supreme Court; Douglas W. Hillman, Chief Judge, United States District Court, Western District of Michigan; Donald P. Lay, Chief Judge, United States Court of Appeals for the Eighth Circuit; Joseph H. Rodriguez, United States District Judge, District of New Jersey; John A. Speziale, former Chief Justice of the Connecticut Supreme Court; and Henry Woods, United States District Judge, Eastern District of Arkansas.

The legal academic community is also represented on the Board of the National Board of Trial Advocacy. In addition to Judge Jim R. Carrigan, former Professor of Law at the University of Colorado Law School, and Kenneth S. Broun, former Dean of the University of North Carolina Law School, two current law professors and one law school dean serve on the Board. They are: David J. Sargent,

Dean of Suffolk University Law School in Boston, Massachusetts; James W. Jeans, Professor of Law at the Law School of the University of Missouri at Kansas City (and noted author on trial advocacy); and Stephen Wizner, Professor of Law at Yale Law School in New Haven, Connecticut.

The National Board of Trial Advocacy is in residence at Suffolk University Law School in Boston, Massachusetts, and its Executive Director is Suffolk University Law Professor Timothy Wilton. Professor Wilton, who supervises the day to day operations of the National Board of Trial Advocacy, received his B.A. in 1968 from Harvard University and his J.D. in 1971 and his LL.M. in 1977, both from Harvard Law School. Professor Wilton had extensive trial and litigation experience before he became a law professor in 1977. He teaches or has taught Trial Advocacy, Evidence, Civil Procedure Public Interest Litigation, and Constitutional Law. He has published extensively in trial and litigation related areas and has lectured at meetings of the American Bar Association and the Association of American Law Schools. Professor Wilton has recently been appointed to the Standing Committee on Specialization of the American Bar Association.

As the quality of its institutional sponsors, its Board, and its staff all demonstrate, the National Board of Trial Advocacy is a very well respected, reputable, *bona fide* legal organization, whose integrity and competence can be relied upon. As would be expected from an organization of this caliber, the standards and certification process it implements are rigorous and meaningful. The standards for certification as a Civil Trial Specialist are[3] as follows:

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3. The Illinois Supreme Court noted the discrepancy in the number of trials required for certification as described by Gary Peel, the Association of Trial Lawyers of America (ATLA), and the National Board of Trial Advocacy. The discrepancy apparently was a result of recent changes in this standard by the Board of Directors of the National Board of Trial Advocacy in an effort more accurately to describe a level of experience which should be required of a lawyer before he or she may be certified as a specialist. The National Board of Trial Advocacy brief outlined the current standard, while ATLA described an earlier standard. What is important is that the standard is and has always been a rigorous and substantial one, and one which demonstrates a signficiant level of experience in the specialty.

1. **Current Bar Membership in Good Standing:** Applicants must demonstrate current bar membership in good standing in the state of their admission, or, if admitted in more than one state, in the state of their principal practice.

2. **Disclosure of Misconduct:** Candidates for National Board of Trial Advocacy certification must disclose any convictions of crimes or proceedings in which they were subjected to professional discipline. The National Board of Trial Advocacy Board assesses any such instances of misconduct to determine the candidates' suitability for certification.

3. **Years of Experience in the Specialty:** Candidates must show at least five years of actual practice in civil trial law during the period immediately preceding the application for certification. Three years of extraordinary practice may be allowed in some cases.

4. **Substantial Involvement in the Specialty:** Applicants must show substantial involvement in trial practice; at least thirty percent of professional time must be spent in civil trial litigation during each of the five years preceding the filing of the application.

5. **Substantial Experience in the Specialty:** Candidates for civil trial certification must also demonstrate their experience by showing that they have appeared as lead counsel in not less than fifteen complete trials of civil matters to verdict or judgment, including not less than 45 full days of trial; at least five of these trials must be to a jury. In addition, applicants must have appeared as lead counsel in at least forty additional contested matters involving the taking of testimony. These may include trials, evidentiary hearings, depositions, or motions heard before or after trial.

6. **Educational Requirements:** Candidates must show participation in forty-five hours of continuing legal education in the specialty in the three year period preceding the application. This requirement may be fulfilled by a variety of activities approved by the National Board of Trial Advocacy Board of Directors. These activities include teaching courses or seminars in trial law; participation as a panelist, speaker, or workshop leader in conferences; authorship of books or professional articles on trial law; and participation in the work of professional committees.

7. **Peer Review:** Each candidate must provide as references the names of six attorneys who are not present partners or associates

of the candidate. These attorneys must be substantially involved in the candidate's field of trial law and must be familiar with the candidate's practice in that field. At least one reference must be from a judge before whom the candidate has appeared as an advocate within two years of application. At least two references must be from a lawyer with whom or against whom the candidate had tried a matter in that field. As a general matter, the National Board of Trial Advocacy requests, and candidates provide, references from three judges and three lawyers with or against whom they have tried cases. The six named references complete a confidential four-page questionnaire with rankings on various criteria regarding the candidate.

8. **Trial Court Memorandum:** Applicants must submit a copy of a substantial trial court memorandum or brief prepared and submitted to a court within three years of application. The quality of the memorandum or brief is carefully examined by the National Board of Trial Advocacy to determine qualification for certification.

9. **Examination:** Applicants must pass a rigorous day-long written examination designed to test experience, proficiency, and knowledge in civil or criminal trial law. This examination contains questions regarding substantive and procedural law as well as trial tactics in various areas of trial practice, and questions on evidence and professional ethics. The examination is administered twice every year throughout the nation, and a new examination is prepared for each administration.

Lawyers successfully fulfilling the requirements for certification must apply for recertification every five years. The recertification standards are designed to insure that the certified lawyer has continued an active trial practice. They are similar to the initial trial standards except that the applicant does not need to retake the examination or submit another trial brief, and the number of trials and other matters required is less. Otherwise, the standards again require current good standing in the Bar, disclosure of professional discipline, participation as lead counsel in a number of complete trials, continuing legal education in the specialty, and additional references from lawyers and judges.

In addition to rigorously testing the experience, skill, and proficiency of candidates for certification, the National Board of Trial Advocacy certification process is impartial and objective to protect

the public from unreliable claims of special expertise in trial advocacy. No preference is given in the certification process to members of sponsoring organizations. Board members cannot seek certification while serving on the Board. Examinations are graded anonymously, by number rather than name. In addition, the standards are applied in a rigorous, meaningful fashion. Applicants have been rejected because of insufficiency of trial experience as lead counsel, inadequate quality of the sample trial memorandum, lack of adequate participation in continuing legal education, or below average ratings on peer review. In addition, many applicants have been rejected for insufficient performance on the rigorous and demanding examination. A lawyer who is refused certification or recertification may not apply again for certification until one year after the date of such refusal, denial, or revocation.

As the preceding discussion demonstrates, the National Board of Trial Advocacy is a well respected, reputable organization which applies rigorous, comprehensive standards in its certification process. A lawyer who satisfies these standards in fact has demonstrated a special competence in civil trial advocacy by reason of his *concentration* of a substantial percentage of his professional time in the specialty, his extensive *experience* in the specialty, indicated by being lead counsel in 15 complete trials and 40 other matters, as well as the requirements of five years of concentration in the specialty and 45 hours of continuing legal education in the specialty, and significant *ability* in the specialty as evidenced by superior ratings on peer review questionnaires by judges and other lawyers, on the submitted trial memorandum, and on the day-long comprehensive examination. The fact that a lawyer has met these rigorous standards is information which a person seeking a lawyer for such a case would find helpful and relevant in selecting an attorney. Such a lawyer can accurately be called a Civil Trial Specialist, without in any way deceiving the public.

The traditional concern with a lawyer's holding himself out as a specialist is that the term implies that the lawyer has special competence in the field beyond that of other non-specialist lawyers. While that implication may be deceptive in some cases in the absence of standards to insure that the lawyer in fact has special competence, in the case of an attorney certified by the National Board of Trial

Advocacy, it is true and accurate. Lawyers who meet the National Board of Trial Advocacy requirements have indeed demonstrated that they possess experience and ability beyond that of the average lawyer. This is precisely the kind of truthful, accurate, relevant information which the public should have access to.

II. TWO STATE SUPREME COURTS HAVE HELD THAT A STATEMENT OF NATIONAL BOARD OF TRIAL ADVOCACY CERTIFICATION IS NOT DECEPTIVE AND THAT THEIR DISCIPLINARY RULES WHICH PROHIBITED SUCH SPEECH CONFLICTED WITH THE FIRST AMENDMENT; UNTIL THIS CASE, NO COURT HAS EVER HELD TO THE CONTRARY; OTHER STATES HAVE ALSO FORMALLY RECOGNIZED NATIONAL BOARD OF TRIAL ADVOCACY CERTIFICATION.

On two previous occasions, the Supreme Courts of other states have considered the interaction of the First Amendment, their disciplinary rules regarding specialty advertising, which were similar to Illinois' DR 2-105, and a lawyer's public statement that he was certified by the National Board of Trial Advocacy. In both cases, the disciplinary rules were struck down as unconstitutional because they prohibited the dissemination of this truthful, relevant and non-deceptive information. These are the only other two cases to consider this question, and other than in the instant case, no court has ever held to the contrary.

In *In Re Johnson*, 341 N.W.2d 282 (Minn. 1983), the Minnesota Supreme Court reviewed the disciplinary proceedings brought against an attorney for advertising his certification by the National Board of Trial Advocacy. The court found its own rule unconstitutional as applied to this situation:

> Richard W. Johnson was admonished for advertising his certification as a Civil Trial Specialist by the National Board of Trial Advocacy (NBTA). Rule 2-105(B) of the Minnesota Code of Professional Responsibility prohibits a lawyer from holding himself or herself out as a specialist. Disciplinary Rule (DR)2-105(B) is unconstitutional and the admonishment against Johnson is vacated.

Id. at 282. The court reviewed the First Amendment precedents, as

well as the certification process of the National Board of Trial Advocacy, which the court found to be "rigorous and exacting:"

> NBTA applies a rigorous and exacting set of standards and examinations on a national scale before certifying a lawyer as a trial specialist, either criminal or civil or both.

Id. at 283. Finally the court commented on the laudable purposes of the disciplinary rule, but noted its overbreadth in suppressing non-deceptive certifications like that of the National Board of Trial Advocacy, and held it to be unconstitutional:

> Applying *R.M.J.* and *Appert* [*Matter of Discipline of Appert*, 315 N.W.2d 204 (Minn. 1981)] to the facts of this case, it appears that DR 2-105(B) is too restrictive. The rule is designed to prevent misleading an uninformed public by claims of specialization and quality of services. That in and of itself is a meritorious goal. But the method used to achieve that goal is to impose a blanket prohibition on all commercial speech regarding specialization until the Minnesota Supreme Court promulgates rules describing what specialty designations will be accepted and how to get that designation. In view of the overbreadth of the rule, the lack of presentation to this court of proposed rules, and the finding of the panel that this advertisement was not misleading or deceptive, there is no basis for upholding the rule in this case. DR 2-105(B) is hereby declared unconstitutional on its face and as applied and the admonition issued by the director of the Board of Professional Responsibility against Richard W. Johnson is hereby vacated.

Id. at 285.

In response to this case, the Minnesota State Bar Association proposed, and the Minnesota Supreme Court adopted, a new disciplinary rule which outlined a program to regulate the advertising of specialty certification in order to protect the public from claims of certification based on inadequate standards. The program created a State Board of Legal Certification which reviewed and approved or disapproved certification agencies based on the quality of their program and the sufficiency of their standards. The National Board of Trial Advocacy has been approved as an authorized certifying agency by the Minnesota State Board of Legal Certification.

In *Ex Parte Howell*, 487 So. 2d 848 (Ala. 1986), the Alabama Supreme Court considered the constitutionality of its disciplinary rule regarding a lawyer holding himself out as a certified specialist, which

was similar to that of Illinois, as applied to certification by the National Board of Trial Advocacy. The Alabama Bar Association raised the same arguments in that case that the Disciplinary Commission has in this case, including the worry that permitting public statements regarding certification might "spawn spurious certifying organizations whose certifications would be meaningless." *Id.* at 851. The Alabama Supreme Court rejected these arguments. It held that the public dissemination of the fact of a lawyer's certification by the National Board of Trial Advocacy would be meaningful information for the public and not in any way deceptive or misleading:

> It would be less than realistic for us to take the position that all lawyers, in fact, possess equal experience, knowledge, and skills with regard to any given area of legal practice. Although there is presently no state-sanctioned mechanism for identifying legal specialists, it appears to us that a certification of specialty by the NBTA [National Board of Trial Advocacy] would indicate a level of expertise with regard to trial advocacy in excess of the level of expertise required for admission to the bar generally. We conclude, therefore, that Howell's proposed advertisement of certification by the NBTA as a civil trial advocate would not be misleading or deceptive on its face.

Id.

The Alabama Supreme Court, with the benefit of the Minnesota experience to draw from, then directed the Bar Association to formulate a plan along the lines of the Minnesota plan to evaluate certifying agencies in order to protect the public from spurious agencies and meaningless certifications:

> We direct the Bar Association to formulate a proposed rule and a method for approving certifying organizations such as the NBTA before allowing the certifications to be advertised. Such a procedure . . . will reduce the possibility of spurious certifying organizations being used to mislead the public.

Id. The Bar Association proposed, and the Alabama Supreme Court adopted such a rule. The National Board of Trial Advocacy has been approved under that rule.

In two other states, Connecticut and Georgia, the disciplinary rules have been amended without the need for litigation in order to create the same kind of approval process for certifying agencies as

exists in Minnesota and Alabama. The National Board of Trial Advocacy is approved in both Connecticut and Georgia.

In some other states, the Supreme Courts or Bar Associations have created their own certification process.[4] The National Board of Trial Advocacy cooperates with and has been recognized by a number of these states. The National Board of Trial Advocacy requires that any applicant from a state which operates its own certification program must first be certified by that state program before he may apply for certification by the National Board of Trial Advocacy. When Florida implemented its own state certification program for Civil Trial Advocacy in 1982, for example, it recognized and accepted certification by the National Board of Trial Advocacy as a satisfactory equivalent for the Florida certification examination, so that lawyers with National Board of Trial Advocacy certification were exempted from the examination. The same recognition and exemption was included when Florida implemented its Criminal Trial Advocacy certification in 1986.

Thus, prior to this case, the states which have considered the question have uniformly determined: (1) that the National Board of Trial Advocacy is a reputable organization with rigorous and comprehensive certification standards; (2) that a lawyer's public statement of his certification by the National Board of Trial Advocacy is useful, accurate information for the public, and is not misleading or deceptive; and (3) that discipline of an attorney for publicly stating that he is certified by the National Board of Trial Advocacy would violate the First Amendment.

CONCLUSION

This court should resolve the confusion among the states, the disparate treatment afforded the over 1,000 attorneys throughout the nation who are certified as Criminal or Civil Trial Specialists by the National Board of Trial Advocacy, who may tell the public of their certification in some states, but risk professional discipline in others for such action. This court should consider whether the truthful statement of certification by the National Board of Trial Advocacy is protected by the First Amendment. The writ of certiorari should be granted.

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4. *See* note 1, *supra*.

Respectfully submitted,

NATIONAL BOARD OF TRIAL ADVOCACY
by its attorney,

Timothy Wilton
Professor of Law
Executive Director

National Board of Trial Advocacy
in residence at:
Suffolk University Law School
Beacon Hill
Boston, MA 02114-4280
(617) 573-8700

No. 88-1775

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

GARY E. PEEL,
Petitioner,
v.
ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA THE AMERICAN BOARD OF PROFESSIONAL LIABILITY ATTORNEYS THE INTERNATIONAL ACADEMY OF TRIAL LAWYERS THE NATIONAL ASSOCIATION OF WOMEN LAWYERS THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR CERTIORARI

BILL WAGNER, ESQ.
708 Jackson St.
Tampa, FL 33602
President, Association of Trial Lawyers of America

*JEFFREY ROBERT WHITE, ESQ.
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(202) 965-3500
Counsel for Amici Curiae
* Counsel of Record

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

No. 88-1775

GARY E. PEEL,

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v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

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MOTION FOR LEAVE TO FILE BRIEF AMICUS ON BEHALF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA THE AMERICAN BOARD OF PROFESSIONAL LIABILITY ATTORNEYS THE INTERNATIONAL ACADEMY OF TRIAL LAWYERS THE NATIONAL ASSOCIATION OF WOMEN LAWYERS THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR CERTIORARI

Pursuant to Rule 42 of the Rules of this Court, applicants respectfully move this Court for leave to file the accompanying brief as amicus curiae in support of the Petition for Writ of Certiorari in this case.

This motion is necessitated by the refusal of counsel for Respondent to consent to the filing of this brief.

Applicants are voluntary national associations of practicing attorneys whose goals include the advancement of justice by fostering the availability of legal representation to those in need of legal services. A key to this goal is the consumer's access to information that will enable him or her to make an informed decision concerning legal representation,

Individual applicants are identified in greater detail in the accompanying brief in support of the Petition for Certiorari. Of greatest significance to this Court's decision on this motion is the fact that applicants are sponsors of the National Board of Trial Advocacy, whose certification of trial specialists is at the heart of this case.

As the sponsors of NBTA, applicants have a substantial stake in this Court's resolution of this case. Moreover, applicants believe that their brief in this case will be of assistance to this Court. Applicants expect to address issues that are not likely to be fully explored by the parties themselves. Of particular concern to applicants is the fundamental premise of NBTA that the public is best served by certification of trial specialists under a national program, applying national standards, and providing this information to the public in a uniform, consistent manner in all states.

For these reasons, applicants respectfully move the Court for leave to file the accompanying brief in this case as amicus curiae.

Respectfully submitted,

JEFFREY ROBERT WHITE
1050 31st St., N.W.
Washington, DC 20007
(202) 965-3500
Counsel for amici curiae

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

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ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA THE AMERICAN BOARD OF PROFESSIONAL LIABILITY ATTORNEYS THE INTERNATIONAL ACADEMY OF TRIAL LAWYERS THE NATIONAL ASSOCIATION OF WOMEN LAWYERS THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR CERTIORARI

QUESTION PRESENTED

Does the First Amendment to the Constitution of the United States permit the Illinois Supreme Court, in direct and acknowledged conflict with two other State supreme courts, to impose public censure on an attorney for stating on his letterhead the truthful and readily verifiable fact that he had been certified as a specialist in civil trial advocacy by the National Board of Trial Advocacy?

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INTERESTS OF AMICI

Amici are independent voluntary bar associations who are sponsors of the National Board of Trial Advocacy ["NBTA"].

The Association of Trial Lawyers of America is an association of over 60,000 attorneys who are engaged primarily in representing the victims of tortious misconduct. ATLA's sponsorship of NBTA springs from a conviction that competent trial advocacy demands a degree of knowledge, skill, and experience beyond that required for admission to the bar generally. Moreover, those in need of legal services require objective information regarding an attorney's knowledge, skill, and experience in trial advocacy in order to make an informed choice concerning legal representation.

The American Board of Professional Liability Attorneys is a highly selective national organization of approximately 350 trial attorney specialists with expertise and experience in professional negligence and product liability litigation.

The International Academy of Trial Lawyers, established in 1954, has a membership of 500 U.S. Fellows who are specialists in trial practice, representing claimants or defendants.

The National Association of Criminal Defense Lawyers consists of 5,000 members and is the only national bar organization working on behalf of public and private criminal defense attorneys.

The National Association of Women Lawyers, founded in 1899, includes in its membership private practitioners, prosecutors, public defenders, trial and appellate judges, law professors and law students.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BY THE ILLINOIS SUPREME COURT THAT THE FIRST AMENDMENT DOES NOT FORBID A BLANKET PROHIBITION AGAINST ATTORNEY ADVERTISING OF THE TRUTHFUL FACT OF NBTA CERTIFICATION AS A TRIAL SPECIALIST IS IN CONFLICT WITH TWO OTHER STATE SUPREME COURTS.

In 1977, this Court laid to rest the "paternalistic" notion that "the public is better kept in ignorance than trusted with correct but incomplete information." *Bates* v. *State Bar of Arizora*, 433 U.S. 350, 374 (1977). Moreover, "it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." *Id.* at 375.

That same year, the National Board of Trial Advocacy was established to furnish the public with the information necessary to make an informed choice of legal representation in matters requiring trial advocacy. Its program followed the medical profession's example of board certification of specialists. The NBTA program is based on the premises that the public is best served by (1) rigorous and objective standards as to education, experience, and expertise in trial advocacy, (2) application of these criteria on a uniform, national basis, and (3) disclosure to the public of NBTA certification of the fact an attorney has met these standards. [For further detail concerning the operation of the NBTA program and its standards for certification, Amici respectfully refer the Court to the Brief of NBTA as amicus curiae in support of the Petition.]

Attorney statements to the public regarding NBTA certification as a trial specialist admittedly come into conflict with the state versions of Code of Professional Responsibility DR 2-105 still in effect in many jurisdictions. That rule imposes a blanket prohibition on attorney use of the terms

"certified" or "specialist", apart from historically recognized specialties, such as admiralty and patent law. Two state supreme courts have held that a state may not, consistent with the First Amendment, apply DR 2-105 to prohibit attorney statements disclosing certification by NBTA. *Johnson* v. *Director of Professional Responsibility*, 341 N.W.2d 282 (Minn. 1983); *Ex Parte Howell*, 487 So. 2d 848 (Ala. 1986). Both Courts relied upon findings that the statement of NBTA certification is not misleading or deceptive. 341 N.W.2d at 285; 487 So. 2d at 851. Both concluded that this Court's decision *In re R.M.J.*, 455 U.S. 191 (1982), prohibits a blanket prohibition of such statements. *Id.*

The decision by the Illinois Supreme Court in this case is the first instance in which a state supreme court has held that statements of NBTA certification are not protected by the First Amendment and may be prohibited under DR 2-105. 534 N.E.2d 980 (Ill. 1989). The Illinois Court's decision is based on its ruling that "certified" and "specialist" are misleading terms. The decision is thus in direct and irreconcilable conflict with the First Amendment decisions of the supreme courts of Alabama and Minnesota.

Supreme Court Rule 17.1(b) states that a consideration governing this Court's discretion to grant review is "When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals." Amici submit that the Illinois Supreme Court's decision in this case warrants review by this Court.

II. THE ILLINOIS COURT'S DECISION THAT THE TERMS "CERTIFIED" AND "SPECIALIST" ARE MISLEADING FOR FIRST AMENDMENT PURPOSES IS A QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT, AND IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

Amici also suggest that this case raises both considerations identified in Supreme Court Rule 17.1(c):

> When a state court . . . has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

A. THE ILLINOIS COURT'S APPROVAL OF A BLANKET PROHIBITION ON USE OF THE TERMS "CERTIFIED" AND "SPECIALIST" IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

It is difficult to see how use of the term "certified" could be misleading to the public in the manner asserted by the court below. 534 N.E.2d at 984. The court expressed concern that consumers would confuse "certified" with "licensed," a function within the sole authority of the court itself. The statement clearly indicates that certification was by the National Board of Trial Advocacy and the Illinois Court conducts no certification program that would raise the possibility of confusion. Additionally, the court asserted that the statement is misleading as a tacit claim as to the quality of legal services. *Id.*

It is clear that the court below did not establish that either "certified" or "specialist" is inherently misleading. The court was plainly concerned that members of the public might misinterpret either of those terms. Such concerns,

however, as this Court has repeatedly emphasized, do not justify blanket prohibitions on commercial speech.

> [W]hen the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information may be presented in a way that is not deceptive.

In re R.M.J., 455 U.S. 191, 203 (1982).

Later, this Court stated:

> Although our decisions have left open the possibility that Sates may prevent attorneys from making nonverifiable claims regarding the quality of their services . . . they do not permit a State to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas.

Zauderer v. *Office of Disciplinary Counsel*, 471 U.S. 626, 641, n.9 (1985).

Amici suggest that the Illinois Court's application of the First Amendment in this case is in conflict with this Court's decisions relating to permissible limitations on attorneys' commercial speech. For that reason, amici urge this Court to grant review of this case.

B. THE FIRST AMENDMENT PROTECTION TO BE ACCORDED TRUTHFUL PUBLIC STATEMENTS REGARDING CERTIFICATION BY A BONA FIDE ORGANIZATION IS A MATTER WHICH SHOULD BE SETTLED BY THIS COURT.

The NBTA program is national in scope, reflecting not only the increasing mobility of our society, but also the trend toward national standards in law and in other professions. Koskoff, *Specialization Update*, 15 Trial 24 (1979). Experience indicates that the large start-up costs and relatively high operating expenses associated with meaningful certification programs make individual state programs infeasible for many states. Lumbard, *Specialty Certification for Lawyers: The National Alternative to the Non-Existent State Programs*, 1981 Women Lawyers J. 23.

Such a national program depends, however, upon consistent application of First Amendment principles. The decision by the Illinois Court that an attorney may be disciplined for using in his letterhead statements which other courts have held protected by the First Amendment endangers the operation of the program as nationally recognized standard that consumers can rely upon. Only a clear decision by this Court can avoid a "balkanization" of First Amendment values regarding professional qualifications.

CONCLUSION

For these reasons amici urge this Court to grant the Petition for a Writ of Certiorari in this case.

Respectfully submitted,

JEFFREY ROBERT WHITE
1050 31st St., N.W.
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Counsel for Amici

June 2, 1989

No. 88-1775

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GARY E. PEEL,
Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,
Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

JOINT APPENDIX

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* Counsel of Record

PETITION FOR CERTIORARI FILED MAY 2, 1989
CERTIORARI GRANTED JULY 3, 1989

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INDEX TO JOINT APPENDIX

* Reprinted in Appendix to Petition for Certiorari.

RELEVANT DOCKET ENTRIES

10/12/86	Notice Pursuant to Commission Rule 105
	Notice of Filing; Motion for Leave to File First Set of Interrogatories; Proposed Order
	First Set of Interrogatories
4/9/87	Complaint; Notice of Hearing; Order; Notice to Appear for Deposition; Entry of Appearance and Acceptance of Service
	Motion to Dismiss
5/8/87	Notice of Filing; Notice; Motion to Strike Respondent's First Set of Interrogatories
5/19/87	Notice of Filing; Petition for Leave to File Response Instanter; Affidavit; Administrator's Response to Respondent's Motion to Dismiss; Memorandum of Law in Support of the Administrator's Response to Respondent's Motion to Dismiss
6/10/87	Answer
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6/24/87	Notice of Filing; Notice to Appear for Deposition
6/25/87	Notice of Filing; Answer to Interrogatories
7/2/87	Notice of Filing; Motion to Continue; Proposed Order
7/6/87	Notice of Filing; Motion to Conduct Public Hearings; Proposed Order
7/6/87	Order
7/9/87	Order
7/10/87	Administrator's Response to Respondent's Motion to Conduct Public Hearings
7/20/87	Second Motion to Continue
7/22/87	Notice of Filing and Objection to Respondent's Second Motion to Continue

BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

Administrator's No. 87 SH 76

IN THE MATTER OF: GARY E. PEEL,
Attorney-Respondent,
No. 2166259.

COMPLAINT

[Filed April 9, 1987]

Carl H. Rolewick, Administrator of the Attorney Registration and Disciplinary Commission by his attorney William F. Moran, III, complains of Respondent Gary E. Peel and alleges that Respondent, who was licensed to practice law in Illinois on November 14, 1968 and is still so licensed, has been guilty of conduct which tends to bring the courts and the legal profession into disrepute as follows:

1. On or before April 15, 1986 Respondent had stationary created for use in his practice of law. The letterhead on this stationary holds Respondent out as a "Certified Civil Specialist by the National Board of Trial Advocacy." A copy of this stationary is attached as Exhibit 1.

2. Between April 15, 1986 and the date the Inquiry Board voted a complaint in this matter, Respondent used the above stationary in the ordinary course of his practice of law.

3. At no time has the Supreme Court of Illinois recognized any certification by the National Board of Trial Advocacy.

4. Respondent's conduct set forth above constitutes:

a. violating a disciplinary rule in violation of Rule 1-102(a)(1) of the Illinois Code of Professional Responsibility;

b. a false or misleading statement in violation of Rule 2-101(b); and

c. publicly holding himself out as a certified legal specialist in violation of Rule 2-105(a)(3).

WHEREFORE, the Administrator prays that this cause be assigned to a hearing panel of the Hearing Board, that a hearing be conducted, that the panel make findings of fact and conclusions of fact and law and a recommendation for such discipline and costs as is warranted.

CARL H. ROLEWICK
Administrator
Illinois Attorney Registration
and Disciplinary Commission

By: /s/ William F. Moran, III
Counsel for the Administrator

WILLIAM F. MORAN, III, Counsel
Attorney Registration and
Disciplinary Commission
One North Old Capitol Plaza, #345
Springfield, Illinois 62701
Telephone: (217) 522-6838

BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

Administrator's No. 87-SH-76

IN THE MATTER OF: GARY E. PEEL,
Attorney-Respondent,
No. 2166259

FIRST SET OF INTERROGATORIES

To: CARL H. ROLEWICK, Administrator of the Attorney Registration and Disciplinary Commission

And: WILLIAM F. MORAN III, Counsel for the Attorney Registration and Disciplinary Commission

Pursuant to Illinois Supreme Court Rules 251 and 213, you are directed to answer the following interrogatories, *under oath*, within 28 days after service of said interrogatories on you.

1. Identify the name and address of each person having knowledge of the allegations of paragraph #1 of the Complaint filed in the above captioned cause.

2. Identify the name and address of each person who initiated the investigation of the charges which led to the filing of the Complaint in the above captioned cause.

3. Identify the name and address of each person having knowledge of the allegations of paragraph #2 of the Complaint filed in the above captioned cause.

4. Identify the name and address of each person having knowledge of the allegations of paragraph #3 of the Complaint filed in the above captioned cause.

5. Identify the name and address of each person having knowledge of the allegations of paragraph #4(a) of the Complaint filed in the above captioned cause.

6. Identify the name and address of each person having knowledge of the allegations of paragraph #4(b) of the Complaint filed in the above captioned cause.

7. Identify the name and address of each person having knowledge of the allegations of paragraph #4(c) of the Complaint filed in the above captioned cause.

8. Identify the name and address of each person having knowledge that Gary E. Peel's letterhead specialty designation, (i.e. "Certified Civil Specialist by the National Board of Trial Advocacy" or "Certified Civil Trial Specialist by the National Board of Trial Advocacy") is *false*, as alleged in paragraph 4(b) of the Complaint filed in the above captioned cause.

9. Identify the name and address of each person having knowledge that Gary E. Peel's letterhead specialty designation, (i.e. "Certified Civil Specialist by the National Board of Trial Advocacy" or "Certified Civil Trial Specialist by the National Board of Trial Advocacy") is *misleading*, as alleged in paragraph 4(a) of the Complaint filed in the above captioned cause.

10. Identify (by title, date of publication, author, and source) any and all studies, surveys, polls, investigations, inquires, [sic] probes, data, research, or assessments—whether conducted by the Illinois Supreme Court, the Illinois Registration and Disciplinary Commission, or any other bureau, office, department, organization, or academic institution—which have concluded that the designation "Certified Civil Specialist by the National Board of Trial Advocacy" or the designation "Certified Civil

Trial Specialist by the National Board of Trial Advocacy" by an attorney who in fact is so certified, is *misleading*.

11. Identify (by title, date of publication, author, and source) any and all studies, surveys, polls, investigations, inquires, [sic] probes, data, research, or assessments—whether conducted by the Illinois Supreme Court, the Illinois Registration and Disciplinary Commission, or any other bureau, office, department, organization, or academic institution—which have concluded that the designation "Certified Civil Specialist by the National Board of Trial Advocacy" or the designation "Certified Civil Trial Specialist by the National Board of Trial Advocacy" by an attorney who in fact is so certified, is *deceptive*.

12. Identify (by title, date of publication, author, and source) any and all studies, surveys, polls, investigations, inquires, [sic] probes, data, research, or assessments—whether conducted by the Illinois Supreme Court, the Illinois Registration and Disciplinary Commission, or any other bureau, office, department, organization, or academic institution—which have concluded that the designation "Certified Civil Specialist by the National Board of Trial Advocacy" or the designation "Certified Civil Trial Specialist by the National Board of Trial Advocacy" by an attorney who in fact is so certified, is *fraudulent*.

13. Identify (by title, date of publication, author, and source) any and all studies, surveys, polls, investigations, inquires, [sic] probes, data, research, or assessments—whether conducted by the Illinois Supreme Court, the Illinois Registration and Disciplinary Commission, or any other bureau, office, department, organization, or academic institution—which have concluded that the designation "Certified Civil Specialist by the National Board of Trial Advocacy" or the designation "Certified Civil Trial Specialist by the National Board of Trial Advocacy" by an attorney who in fact is so certified, is *false*.

14. Describe any and all actions of the Illinois Supreme Court or the Illinois Registration and Disciplinary Com-

mission to prohibit, ban, deter, forbid, or obstruct the use by attorneys of publicly advertising their "concentration in", "practice limited to" or "availability to practice in" specified areas of the law. [e.g. "concentration in divorce", "practice limited to personal injury", "available to practice in bankruptcy.]

15. Describe any and all actions of the Illinois Supreme Court or the Illinois Registration and Disciplinary Commission to prohibit, ban, deter, forbid, or obstruct the use by attorneys of publicly advertising areas of legal service availability in the "Yellow Pages" of the telephone directories published statewide with the permission of the Illinois Bell Telephone Company by Donnelley Directory, Boulevard Towers South, 205 North Michigan, Chicago, Illinois 60601 in cooperation with Ameritech Publishing of Illinois, Inc., 225 North Michigan, Chicago, Illinois 60601.

16. Illinois Supreme Court Rule 2-105(a)(2) authorizes an attorney engaged in the practice of admiralty to use the designation "Admiralty", Proctor in Admiralty", or "Admiralty Lawyer" or a combination of those terms.

A. What criteria, bases, studies, empirical data, assessments, surveys, support or other authority (e.g. years of experience in the field, continuing legal education, trial experience, or otherwise) of the Illinois Supreme Court or the Illinois Registration and Disciplinary Commission is utilized as the basis for differentiating this *admiralty* form of specialty advertising or designation from any other form of specialty advertising or designation?

17. Illinois Supreme Court Rule 2-105(a)(2) authorizes an attorney engaged in the trademark practice to use the designation "Trademarks", "Trademark Attorney", "Trademark Attorney" or a combination of those terms.

A. What criteria, bases, studies, empirical data, assessments, surveys, support or other authority (e.g. years

of experience in the field, continuing legal education, trial experience, or otherwise) of the Illinois Supreme Court or the Illinois Registration and Disciplinary Commission is utilized as the basis for differentiating this *trademark* form of specialty advertising or designation from any other form of specialty advertising or designation?

18. Illinois Supreme Court Rule 2-105(a)(1) authorizes an attorney admitted to practice before the United States Patent and Trademark Office to use the designation "Patents", Patent Attorney", Patent Lawyer", or Registered Patent Attorney" or a combination of those terms on his letterhead and office sign.

A. What criteria, bases, studies, empirical data, assessments, surveys, support or other authority (e.g. years of experience in the field, continuing legal education, trial experience, or otherwise) of the Illinois Supreme Court or the Illinois Registration and Disciplinary Commission is utilized as the basis for differentiating this *patent* form of specialty advertising or designation from any other form of specialty advertising or designation?

B. What criteria, bases, studies, empirical data, assessments, surveys, support or other authority is utilized by the Illinois Supreme Court or the Illinois Registration and Disciplinary Commission to allow the United States Patent and Trademark Office to exclusively determine the qualifications of an attorney whose expertise is permitted to be publicly displayed in the State?

C. On what basis does the Illinois Supreme Court or the Illinois Registration and Disciplinary Commission allow qualified patent, attorneys to publicly hold themselves out as "certified" or as a "specialist" to the exclusion of other qualified attorneys in other areas of practice?

19. On what basis does the Illinois Supreme Court or the Illinois Registration and Disciplinary Commission allow trademark and admiralty attorneys, *without proof of*

qualification, experience, or training to publicly hold themselves out as "certified" or as a "specialist" without permitting other qualified, [*or unqualified,*] attorneys in other areas of practice that same opportunity?

20. Has the Illinois Supreme Court, the Illinois Registration and Disciplinary Commission, or any agency, group, or committee thereof conducted any studies or made any reports on whether less restrictive means exist to regulate commercial advertising of specialty practice by attorneys other than the regulation by Supreme Court Rule 2-105?

21. If the answer to interrogatory #20 is in the affirmative, then state the following as to each study or report.

A.) The name and address of the body or entity commissioning said study or report.

B.) The date said study or report was commissioned.

C.) The date said report or study was completed.

D.) The conclusions and recommendations, if any, reached in said study or report.

E.) The name and address of the person having physical possession of the said study or report.

F.) The name of the report or study.

G.) The action, if any, taken by the Illinois Supreme Court or the Illinois Attorney Registration and Disciplinary Commission, upon the recommendations made in said study or report.

22. As a result of the United States Supreme Court decisions of *Bates vs. State Bar of Arizona* 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) and *In Re R.M.J.*, 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d. 64 (1982), what action, if any, has been taken by the Illinois Supreme Court or the Illinois Attorney Registration and Disciplinary Commission to examine, review, modify, alter, revise or amend Illinois Supreme Court Rule 2-105 so as to place said rule in conformity with those United States Supreme Court decisions on lawyer specialty advertising?

23. As a result of the United States Supreme Court decision of *Supreme Court of Virginia vs. Consumers Union* 446 U.S. 719 (1980) what action, if any, has been initiated by the Illinios Supreme Court or the Illinois Registration and Disciplinary Commission to examine, review, modify, alter, revise or amend Illinois Supreme Court Rule 2-105 so as to place said rule in conformity with that United States Supreme Court decision?

24. Identify the specific "state interests", "state public policies" or "substantial interests", if any, which the Illinois Supreme Court and the Illinois Registration and Disciplinary Commission claims to exist which necessitate the continued enforcement of Supreme Court Rule 2-105?

25. With regard to the "state interests", "state public policies", or "substantial interests" identified in answer to interrogatory #24, state in what manner the Supreme Court Rule 2-105 blanket prohibition on lawyer specialty advertising (except as to patent, trademark, and admiralty) serves as the *least* restrictive method or device to safeguard those stated interests or policies.

26. With regard to the answer to interrogatory #25, identify specifically any and all documents, materials, empirical data, studies, records, reports or other writings utilized or relied upon by you in reaching the conclusion that continued enforcement of Supreme Court Rule is the *least* restrictive method or manner of safeguarding said interests or policies.

27. From the date of the creation of the Illinois Registration and Disciplinary Commission to this date, and exclusive of the above referenced cause, state the total number of disciplinary complaints (or charges) initiated

by the Illinois Registration and Disciplinary Commission for specialty advertising in violation of Supreme Court Rule 2-105.

28. As to those complaints or charges in answer to interrogatory number 27, how many of the total charges resulted in the imposition of sanctions by the Illinois Supreme Court?

29. As to those complaints or charges in answer to interogatory number 27, how many of the total charges resulted in the imposition of sanctions by the Illinois Supreme Court against an attorney who had in fact been certified as a specialist by some board, agency, testing group or Supreme Court of another state or of the federal government?

30. Identify, (by name, address, title, and the name and address of their employer), any and all persons consulted in the preparation of the answers to these interrogatories.

31. State the name and address of the person(s) signing the answers to these interrogatories, *under oath*, and as to each, state the following:

A.) The name and address of his or her employer.

B.) His or her title or job description.

C.) The authority by which he or she is answering these interrogatories on behalf of the Illinois Supreme Court or the Illinois Registration and Disciplinary Commission.

GARY E. PEEL

By: /s/

ROBERT W. BOSSLET
Attorney for Respondent
1406 Niedringhaus
Granite City, Illinois 62040
Telephone: 618-876-8440

BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

Administrator's No. 87-SH-76

IN THE MATTER OF: GARY E. PEEL,

Attorney-Respondent,
No. 2166259.

ANSWER

Comes now the Respondent, GARY E. PEEL, by his attorney, ROBERT W. BOSSLET of MORRIS B. CHAPMAN & ASSOCIATES, LTD., and in answer to the Complaint filed herein states as follows:

1. Respondent admits the allegations of paragraph one.

2. Respondent can neither admit nor deny whether the Inquiry Board voted a complaint in this matter, and therefore, demands strict proof of the allegations contained in paragraph two.

3. Respondent can neither admit nor deny whether the Supreme Court of Illinois has recognized any certification by the National Board of Trial Advocacy, and therefore demands strict proof thereof.

4. Respondent denies each and every allegation and suballegation contained in paragraph four.

WHEREFORE, having fully answered, Respondent prays that the Complaint be dismissed and held for naught.

DATED this 10th day of July, 1987.

/s/ Robert W. Bosslet
ROBERT W. BOSSLET
Morris B. Chapman & Associates
Ltd.
1406 Niedringhaus Avenue
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Granite City, Illinois 62040
618/876-8440

BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSON

Administrator's No. 87 SH 76

IN THE MATTER OF: GARY E. PEEL,
Attorney-Respondent,
No. 2166259.

ANSWER TO INTERROGATORIES

I, Jerome Larkin, Assistant Administrator of the Attorney Registration and Disciplinary Commission, on oath provide the following answers to the following interrogatories pursuant to the Hearing Board's Order of June 1, 1987:

2. Identify the name and address of each person who initiated the investigation of the charges which led to the filing of the Complaint in the above captioned cause.

Carl H. Rolewick, Administrator
Attorney Registration and
Disciplinary Commission
203 North Wabash
Chicago, Illinois 60601 or
One North Old Capitol Plaza, #345
Springfield, Illinois 62701

William F. Moran, III, Counsel
for the Administrator
Attorney Registration and
Disciplinary Commission
One North Old Capital Plaza, #345
Springfield, Illinois 62701

14. Describe any and all actions of the Illinois Supreme Court or the Illinois Registration and Disciplinary Commission to prohibit, ban, deter, forbid, or obstruct the use by attorneys of publicly advertising their "concentration in", "practice limited to" or "availability to practice in" specified areas of the law. [e.g. "concentration in divorce", "practice limited to personal injury", "available to practice in bankruptcy.]

The Administrator has no knowledge of any action taken by the Supreme Court of Illinois to prohibit, ban, deter, forbid, or obstruct the use by attorneys of publicly advertising their "concentration in", "practice limited to" or "availablity to practice in" specified areas of the law.

The Administrator has taken no action to prohibit, ban, deter, forbid, or obstruct the use by attorneys of publicly advertising their "concentration in", "practice limited to" or "availability to practice in" specified areas of the law.

15. Describe any and all action of the Illinois Supreme Court or the Illinois Registration and Disciplinary Commission to prohibit, ban, deter, forbid, or obstruct the use by attorneys of publicly advertising areas of legal service availability in the "Yellow Pages" of the telephone directories published statewide with the permission of the Illinois Bell Telephone Company by Donnelley Directory, Boulevard Towers South, 205 North Michigan, Chicago, Illinois 60601 in cooperation with Ameritech Publishing of Illinois, Inc., 225 North Michigan, Chicago, Illinois 60601.

The Administrator has no knowledge of any action taken by the Supreme Court of Illinois to prohibit, bar, deter, forbid, or obstruct the use by attorneys of publicly advertising areas of legal services availability in the

"Yellow Pages" of the telephone directories published statewide with the permission of the Illinois Bell Telephone Company by Donnelley Directory, Boulevard Towers South, 205 North Michigan, Chicago, Illinois 60601 in cooperation with Ameritech Publishing of Illinois, Inc., 225 North Michigan, Chicago, Illinois 60601.

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16. Illinois Supreme Court Rule 2-105(a)(2) authorizes an attorney engaged in the practice of admiralty to use the designation "Admiralty", "Proctor in Admiralty", or "Admiralty Lawyer" or a combination of those terms.

A. What criteria, bases, studies, empirical data, assessments, surveys, support or other authority (e.g. years of experience in the field, continuing legal education, trial experience, or otherwise) of the Illinois Supreme Court or the Illinois Registration and Disciplinary Commission is utilized as the basis for differentiating this *admiralty* form of specialty advertising or designation from any other form of specialty advertising or designation?

The Administrator has no knowledge as to what bases the Supreme Court of Illinois used in deciding to promulgate Rule 2-105(a)(2) of the Illinois Code of Professional Responsibility. The Attorney Registration and Disciplinary Commission and the Administrator have no authority to promulgate rules which regulate or proscribe attorneys' conduct, therefore, the only manner in which the

Administrator would attain this knowledge would be through legal research related to a disciplinary case. The Administrator has conducted no such research.

17. Illinois Supreme Court Rule 2-105(a)(2) authorizes an attorney engaged in the trademark practice to use the designation "Trademarks", "Trademark Attorney", "Trademark Attorney" or a combination of those terms.

A. What criteria, bases, studies, empirical data, assessments, surveys, support or other authority (e.g. years of experience in the field, continuing legal education, trial experience, or otherwise) of the Illinois Supreme Court or the Illinois Registration and Disciplinary Commission is utilized as the basis for differentiating this *trademark* form of specialty advertising or designation from any other form of specialty advertising or designation?

Same answer as to interrogatory 16A above.

18. Illinois Supreme Court Rule 2-105(a)(1) authorizes an attorney admitted to practice before the United States Patent and Trademark Office to use the designation "Patents", "Patent Attorney", "Patent Lawyer", or "Registered Patent Attorney" or a combination of those terms on his letterhead and office sign.

A. What criteria, bases, studies, empirical data, assessments, surveys, support or other authority (e.g. years of experience in the field, continuing legal education, trial experience, or otherwise) of the Illinois Supreme Court or the Illinois Registration and Disciplinary Commission is utilized as the basis for differentiating this *patent* form of specialty advertising or designation from any other form of specialty advertising or designation?

The Administrator has no knowledge as to what bases the Supreme Court of Illinois used in deciding to promulgate Rule 2-105(a)(1) of the Illinois Code of Professional Responsibility. The Attorney Registration and Disciplinary Commission and the Administrator have no authority to promulgate rules which regulate or proscribe attorneys' conduct, therefore, the only manner in which the Administrator would attain this knowledge would be through legal research related to a disciplinary case. The Administrator has conducted no such research.

B. What criteria, bases, studies, empirical data, assessments, surveys, support or other authority is utilized by the Illinois Supreme Court or the Illinois Registration and Disciplinary Commission to allow the United States Patent and Trademark Office to exclusively determine the qualifications of an attorney whose expertise is permitted to be publicly displayed in this State?

Same answer as to interrogatory 18A above.

C. On what basis does the Illinois Supreme Court or the Illinois Registration and Disciplinary Commission allow qualified patent, attorneys to publicly hold themselves out as "certified" or as a "specialist" to the exclusion of other qualified attorneys in other areas of practice?

Same answer as to interrogatory 18A above.

19. On what basis does the Illinois Supreme Court or the Illinois Registration and Disciplinary Commission allow trademark and admiralty attorneys, *without proof of qualification, experience, or training* to publicly hold themselves out as "certified" or as a "specialist" without permitting other qualified, [*or unqualified,*] attorneys in other areas of practice that same opportunity?

Same answer as to interrogatory 16A above.

30. Identify, (by name, address, title, and the name and address of their employer), any and all persons consulted in the preparation of the answers to these interrogatories.

Carl H. Rolewick
Administrator
Attorney Registration and
Disciplinary Commission
203 North Wabash, 19th Floor
Chicago, Illinois 60601
or
One North Old Capitol Plaza
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Jerome Larkin
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203 North Wabash, 19th Floor
Chicago, Illinois 60601

William F. Moran, III
Counsel
Attorney Registration and
Disciplinary Commission
One North Old Capitol Plaza, #345
Springfield, Illinois 62701

31. State the name and address of the person(s) signing the answers to these interrogatories, *under oath*, and as to each, state the following:

Jerome Larkin

A.) The name and address of his or her employer.

Mr. Larkin is employed by the Attorney Registration and Disciplinary Commission, 203 North Wabash, 19th Floor, Chicago, Illinois or One North Old Capitol Plaza, Suite 345, Springfield, Illinois.

B.) His or her title or job description.

Mr. Larkin is the Assistant Administrator of the Attorney Registration and Disciplinary Commission.

C.) The authority by which he or she is answering these interrogatories on behalf of the Illinois Supreme Court or the Illinois Registration and Disciplinary Commission.

Neither the Attorney Registration and Disciplinary Commission, the Administrator, nor any member of the Administrator's staff has the authority to answer any of these interrogatories on behalf of the Supreme Court of Illinois.

The Assistant Administrator is answering these interrogatories on behalf of the Administrator pursuant to a delegation of authority authorized by Supreme Court Rule 752.

/s/ JEROME LARKIN,
Assistant Administrator
Illinois Attorney Registration
and Disciplinary Commission

Jerome Larkin, Assistant Administrator
Attorney Registration and
Disciplinary Commission
203 N. Wabash, 19th Floor
Chicago, Illinois 60601
Telephone (312) 346-0690

Subscribed and sworn to
before me this 25th day
of June, 1987.

_____

Notary Public

National Board of Trial Advocacy

1985 Directory

Certified Specialists and Board Members

NATIONAL BOARD OF TRIAL ADVOCACY

* * * *

FLORIDA CONT.

Bill Whitaker
The Whitaker Building
45 West Washington Street
Orlando, FL 32802
(305) 843-2222

Edward A. White
902 Barnett Bank Building
Jacksonville, FL 32202
(904) 356-7673

Louis J. Williams
1525 South Florida Avenue
P.O. Box AX
Lakeland, FL 33802
(813) 688-8517

Richard H. Willits
Easley, Massa & Willits, P.A.
1655 Palm Beach Lakes Boulevard
Suite 800
West Palm Beach, FL 33401
(305) 684-7300

W. H. F. Wiltshire
201 East Government Street
P.O. Drawer 1832
Pensacola, FL 32598
(904) 432-7723

Richard E. Wolverton
2600 Ninth Street North
St. Petersburg, FL 33704
(813) 895-1991

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236 South Lucerne Circle
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(404) 322-8876

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Decatur, GA 30030
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Cordele, GA 31015
(912) 273-5202

GEORGIA CONT.

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(404) 228-2125

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P.O. Box 1407
Augusta, GA 30903
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Chicago, IL 60604
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Peoria, IL 61602
(309) 674-2164

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Suite 736
Chicago, IL 60603
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Chicago, IL 60602
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Lawrence W. Leck
Lawrence W. Leck & Assoc., Ltd.
77 West Washington Street
Suite 519
Chicago, IL 60602
(312) 641-2883

Susan E. Loggans
Loggans & Associates
69 West Washington Street
Chicago, IL 60602
(312) 726-0276

Michael H. Minton
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Suite 1802
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Chicago, IL 60601
(312) 346-1300

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Suite 638
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(312) 263-6452

Carl F. Schroeder
201 Naperville Road
Wheaton, IL 60187
(312) 260-6350

Law Offices of Gary E. Peel

2 Center Grove Road
Edwardsville, Illinois 62025
(618) 692-0500

Gary E. Peel
Certified Civil Trial Specialist
By the National Board of Trial Advocacy
Licensed: Illinois, Missouri, Arizona

Debra J. Meadows
Licensed: Illinois
Missouri

EXHIBIT 24

No. 88-1775

(12)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GARY E. PEEL,
Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,
Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR PETITIONER

BRUCE J. ENNIS, JR.*
DONALD B. VERRILLI, JR.
JENNER & BLOCK
21 Dupont Circle, N.W.
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Counsel for Petitioner

* Counsel of Record

September 2, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

I. Does the First Amendment to the Constitution of the United States permit the Illinois Supreme Court, in direct and acknowledged conflict with two other state supreme courts, to impose public censure on an attorney for stating on his letterhead the truthful and readily verifiable fact that he had been certified as a specialist in civil trial advocacy by the National Board of Trial Advocacy?

II. Is a statement from one attorney to another attorney that did not itself propose a commercial transaction, and that was not directly or primarily used or designed to solicit a commercial transaction, subject to regulation as "commercial" speech simply because the statement could indirectly come to the attention of members of the public who might need legal services?

III. Does the First Amendment to the Constitution of the United States permit the Illinois Supreme Court to impose a blanket prohibition, rather than a less restrictive form of regulation, on statements that an attorney is a certified specialist, when the statement was not false, misleading or deceptive on its face, and was not shown to have misled anyone?

IV. Does the Equal Protection Clause of the Fourteenth Amendment permit application of a blanket prohibition to petitioner when statements concerning specialization in patent, admiralty or trademark law are exempted from the prohibition, and when attorneys may make the less meaningful and less verifiable statement that they "limit their practice to" or "concentrate their practice in" civil trial advocacy?

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IN THE
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v.
ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,
Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR PETITIONER

Petitioner Gary E. Peel respectfully prays that this Court reverse the Order and Judgment of the Supreme Court of Illinois entered on February 2, 1989.[1]

OPINIONS BELOW

The February 2, 1989 opinion and judgment of the Supreme Court of Illinois adopting the recommendation of the Review Board of the Illinois Attorney Registration and Disciplinary Commission ("ARDC"), and imposing public censure on petitioner, is reported at 126 Ill.2d 397, 534 N.E.2d 980 (1989), and is reprinted in the Appendix

[1] The parties to the proceeding below were petitioner and the Illinois Attorney Registration and Disciplinary Commission ("ARDC").

to the petition for certiorari ("App.") at 1a. The one-page Report And Recommendation Of The Review Board of the ARDC, entered February 17, 1988, is unreported and is reprinted at App. 16a. The Report of the Hearing Panel, Findings of Facts, Conclusion of Law and Recommendations of the Hearing Board of the ARDC, entered August 27, 1987, is unreported, and is reprinted at App. 17a.

JURISDICTION

The Order and Judgment of the Supreme Court of Illinois was entered on February 2, 1989. This Court granted certiorari on July 3, 1989. On July 26, 1989, an order was entered enlarging the time for filing petitioner's brief until September 2, 1989. Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 2-105(a) of the Illinois Code of Professional Responsibility (107 Ill.2d R. 2-105(a)), provides:

> Rule 2-105. Limitation of Practice
>
> (a) A lawyer shall not hold himself out publicly as a specialist, except as follows:
>
> (1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney" or any combination of those terms, on his letterhead and office sign.
>
> (2) A lawyer engaged in the trademark practice may use the designation "Trademarks," "Trademark Attorney" or "Trademark Lawyer," or a combination of those terms, and a lawyer engaged in the admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or "Admiralty Lawyer," or a combination of those terms, in any form of communication otherwise permitted under Rules 2-101 through 2-104.
>
> (3) A lawyer or law firm may specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice. Except as set forth in Rule 2-105(a), no lawyer may hold himself out as "certified" or a "specialist." (107 Ill.2d R. 2-105.)

STATEMENT OF THE CASE

This case presents a narrow but important issue of First Amendment law: whether the State of Illinois may constitutionally discipline petitioner Gary E. Peel for including in his letterhead the accurate and readily verifiable statement that he has been certified as a civil trial specialist by the National Board of Trial Advocacy.[2] Petitioner Peel's letterhead was in conflict with Illinois Disciplinary Rule 2-105(a)(3) ("D.R. 2-105"), which

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[2] Petitioner Peel also asserts that Disciplinary Rule 2-105 violates the Equal Protection Clause of the Fourteenth Amendment because, as applied to the statements on his letterhead, the rule is utterly arbitrary and irrational. *See* Point III *infra*.

bans *all* attorney statements about certification. As applied to statements about attorney certification such as the one at issue, however, the blanket prohibition contained in D.R. 2-105 transgresses the First Amendment. Accordingly, the judgment of the Supreme Court of Illinois affirming the public censure of Mr. Peel should be reversed.

As respondent concedes, the relevant facts are simple and undisputed.[3] Petitioner was licensed to practice law in Illinois in 1968, in Arizona in 1979, and in Missouri in 1981. Hearing Transcript ("H.Tr.") at 23; (App. 27a). Petitioner has tried more than a hundred jury cases and more than three hundred nonjury cases to conclusion, and has handled more than a thousand other matters that did not proceed to trial. He has held office in national, state and local bar associations—including vice chair of the Insurance and Tort Committee of the General Practice Section of the American Bar Association—and has taught trial advocacy in continuing legal education classes and workshops. *See* H.Tr. at 23-26 (App. 28a-30a).

In 1981, after satisfying the rigorous standards of the National Board of Trial Advocacy ("NBTA"), petitioner was certified by the NBTA as a specialist in civil trial advocacy. H.Tr. at 26; (App. 29a). In 1983, petitioner began placing on his letterhead the truthful statement that he was certified as a civil trial specialist by the National Board of Trial Advocacy.[4] Petitioner used that

[3] *See* Opposition to Petition for Certiorari, at 1.

[4] An example of Petitioner's letterhead can be found in the Joint Appendix at 24; *see also* App. 21a (typeset reproduction of letterhead). Petitioner's letterhead statement that he is a certified civil trial specialist by NBTA is accurate and nonmisleading. Petitioner is, for example, listed in a directory of "Certified Specialists and Board Members" of NBTA. (J.A. 22). Furthermore, the State has not alleged, and no evidence was offered at petitioner's hearing to prove, that the letterhead statement was false, deceptive or misleading as a factual matter.

letterhead in the "ordinary course" of his practice of law. H.Tr. at 21; (App. 25a). He did not use the letterhead, or the statement that he was a certified specialist, as part of any direct effort to solicit new clients, and respondent has never claimed that he did. Specifically, petitioner has never used that statement "in the yellow pages," and has "not mailed out brochures, advertisements or other types of printed materials" containing that statement. H.Tr. at 30; (App. 30a).[5] It was the mere use of a letterhead reflecting NBTA certification—and nothing more—that resulted in Illinois' public censure of petitioner.

1. The Significance of NBTA Certification.

Bona fide attorney certification programs—particularly in trial advocacy—can substantially advance the public interest. Over fifteen years ago, then-Chief Justice Burger commented that "some system of certification for trial advocates is an imperative and long overdue step."[6] In his view, the absence of certification programs "has helped bring about the low state of American trial advocacy and a consequent diminution in the quality of our entire system of justice."[7] He expressly endorsed "certification of the one crucial specialty of trial advocacy

[5] Except for his letterhead, petitioner's certification by the NBTA was publicized in only two other ways. In 1981, when he was first certified (petitioner was recertified in 1986), "[t]here was a newspaper announcement in the business section of the local Edwardsville [Illinois] newspaper which said basically that Gary Peel had been recently certified as a civil trial specialist by the National Board of Trial Advocacy." H.Tr. at 29; (App. 30a). The fact of certification also appears in petitioner's Martindale-Hubbell listings. H.Tr. at 30; (App. 30a).

[6] Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice? 42 *Fordham L. Rev.* 227 (1973).

[7] *Id.* at 230.

that is so basic to a fair system of justice and has had historic recognition in the common law system." [8]

NBTA was founded in 1976 to meet this public need. NBTA seeks to improve the quality of the trial bar and to enhance the delivery of legal services to the public by providing a reliable national credentialing process for specialists in trial advocacy. The organization is sponsored by the National District Attorneys' Association, the American Trial Lawyers Association, the International Society of Barristers, the National Association of Criminal Defense Attorneys, the National Association of Women Lawyers, and the American Board of Professional Liability Attorneys. It is overseen by a distinguished board of judges, practitioners and academics—including Justice William H. Erickson of the Colorado Supreme Court, Chief Judge Donald P. Lay of the United States Court of Appeals for the Eighth Circuit, and Chief Judge Douglas W. Hillman of the United States District Court for the Western District of Michigan.

NBTA certifies only those who meet its exacting objective standards of experience, ability and concentration in trial advocacy. The standards for certification as a civil trial specialist include: (1) current bar membership in good standing; (2) at least five years experience in civil trial law during the period immediately preceding application for certification; (3) substantial concentration in trial practice—defined as at least 30% of the applicant's professional time during each of the five years preceding application; (4) appearance as lead counsel in at least 15 complete trials of civil matters to verdict or judgment, including not less than 45 days of trial and at least five jury trials, and appearance as lead counsel in at least forty additional matters involving the taking of testimony; (5) participation in at least 45 hours of continuing legal education in civil trial advocacy in pro-

[8] *Id.* at 240; *see also id.* at 239, 241.

grams approved by the Board of Directors of NBTA; (6) satisfactory peer review by fellow attorneys and judges; (7) demonstration of high quality written legal work; and (8) successful completion of a rigorous day-long examination designed to test experience, proficiency and knowledge of civil law. Certification must be renewed every five years, and recertification is governed by similarly rigorous standards.[9]

NBTA's certification procedures are widely recognized as exemplary. The Task Force on Lawyer Competence of the Conference of Chief Justices found in a 1982 report that:

> The National Board of Trial Advocacy, a national certification program that provides recognition for superior achievement in trial advocacy, uses a highly-structured certification process in addition to a formal examination to select its members. . . . [C]ertification by the National Board of Trial Advocacy is an arduous process that employs a wide range of assessment methods and entails considerable cost to the candidate.

Report With Findings and Recommendations to The Conference of Chief Justices, May 26, 1982 (Publication Number NCSC-021). The States of Minnesota, Alabama, Georgia and Connecticut have formally endorsed NBTA certification. The Supreme Court of Minnesota has recognized that "NBTA applies a rigorous and exacting set of standards and examinations on a national scale before certifying a lawyer as a trial specialist, either criminal or civil or both." *In re Johnson*, 341 N.W.2d 282, 283 (Minn. 1983); *see also Ex parte Howell*, 487 So.2d 848 (Ala. 1986). Nine other States have adopted their own certification plans, often modelled on NBTA certifica-

[9] *See* Brief *Amicus Curiae* of The National Board of Trial Advocacy In Support of the Petition For Certiorari in No. 88-1775.

tion.[10] In short, as many States acknowledge, NBTA certification provides meaningful information concerning an attorney's civil trial experience and qualifications.

2. The Disciplinary Proceedings Against Petitioner.

On April 15, 1986, while serving as counsel for two *other* attorneys who were the subject of disciplinary proceedings before the ARDC, petitioner corresponded with his attorney/clients on his regular letterhead. Petitioners' clients subsequently attached this correspondence as an exhibit to a submission to the ARDC. The Administrator of the ARDC noticed the statement about NBTA certification on petitioner's letterhead, and initiated a complaint against petitioner on the basis of the letterhead. No lawyer and no member of the public had (or has) ever complained to petitioner or to the ARDC about petitioner's letterhead statement.[11]

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[10] *See* Brief *Amicus Curiae* of the National Board of Trial Advocacy in No. 88-1775, at 2 n.1.

[11] At the hearing before the ARDC, petitioners testified as follows:

"MR. BOSSLET: Q Let me finally ask you, Mr. Peel, because I alluded to it in my opening statement, has any client or layman ever questioned or expressed concern about your listing yourself being certified as the National Board of Trial Advocacy—.

MR. MORAN: Objection. Calls for hearsay.

CHAIRMAN WARREN: We'll let him answer.

THE WITNESS: A No, I have never had any client or lay person question its propriety. The only thing that I have, as a result of the charges brought here today, I have called this to the attention of various other attorneys in my geographical area who have expressed some dismay with the charges, but there has been nothing from the lay person.

MR. BOSSLET: Q Have any attorneys, any other practicing attorneys complained to you about your listing that certification?

[Continued]

The complaint alleged that petitioner's letterhead statement violated D.R. 2-105(a)(3) of the Illinois Code of Professional Responsibility, which states that except as provided in that rule, "no lawyer may hold himself out as 'certified' or a 'specialist.'"[12] To make out a violation of D.R. 2-105, the State need not demonstrate that a claim of certification has actually misled, or even created a risk of misleading, potential clients. Even truthful and nonmisleading attorney statements about certification violate the rule. *Cf. Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1920 (1988). The complaint also charged petitioner with violating D.R. 2-101(b), which prohibits any *misleading* statements by an attorney.[13] Petitioner

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[11] [Continued]

MR. MORAN: Same objection.

CHAIRMAN WARREN: Sustained."

H.Tr. at 35; (App. 31a). And in response to interrogatories propounded by petitioner, the ARDC acknowledged that the only persons who "initiated the investigation of the charges which led to the filing of the Complaint" against petitioner were the administrator of the ARDC and his counsel.

[12] The exception clause appears to be completely meaningless, because nothing in Rule 2-105(a) permits any attorney in any circumstance to hold himself out as "certified" or as a "specialist" in any area of law. Although attorneys may hold themselves out as "patent lawyers," or "trademark lawyers," or "admiralty lawyers," and may say they "concentrate" or "limit" their practice to specified areas of law, nowhere does the rule permit any attorney to use the words "certified" or "specialist."

[13] D.R. 2-101(b) prohibits "any commercial publicity or other form of public communication (including any newspaper, magazine, telephone directory, radio, television, or other advertising)" unless that communication contains "all information necessary to make the communication not misleading" and does "not contain any false or misleading statement or otherwise operate to deceive." The ARDC Administrator vigorously pressed this charge at petitioner's hearing, referring to it as the most important of the charges levied against petitioner. H.Tr. at 40-41; (App. 33a-34a). However, the Administrator introduced no evidence that petitioner's letterhead

sought, but did not obtain, dismissal of the complaint on the ground that the First and Fourteenth Amendments barred Illinois from disciplining him for making the accurate and readily verifiable statement that he was certified by NBTA.[14]

At the hearing on the complaint, the Administrator of the ARDC took the position that petitioner's letterhead violated Rule 2-105(a)(3) and was misleading *as a matter of law*.[15] The Administrator did *not* claim the letterhead was misleading as a matter of fact, and no evidence was presented that anyone had, in fact, been misled by the letterhead statement. The Administrator was apparently forced to argue that mention of NBTA certification on petitioner's letterhead was misleading as a matter of

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was, in fact, false, misleading or deceptive, and the Hearing Board rejected the charge. It found petitioner had violated only D.R. 2-105(a)(3).

[14] Indeed, beginning with his first communication with ARDC concerning the charges against him, petitioner consistently, repeatedly, and at every available stage of the proceedings challenged the constitutionality of the disciplinary rules and their application to him. He explicitly relied on the First Amendment, the Equal Protection Clause, prior decisions of this Court, and the decisions of two other state supreme courts, both of which had held that attorneys could not constitutionally be prohibited from truthfully advertising that they had been certified as civil trial specialists by NBTA. *See* Response to ARDC Complaint (App. 22a); Petitioner's Motion to File First Set of Interrogatories; Petitioner's Motion to Dismiss ARDC Complaint. The Illinois Supreme Court considered and squarely rejected those federal constitutional challenges. 534 N.E.2d at 983-986 (App. 12a-14a) (First Amendment); 534 N.E.2d at 986 (App. 14a) (Equal Protection).

[15] The attorney for the Administrator argued, for example, as follows: "I believe it's a question of law whether or not the facts that have been presented here today show that what [petitioner] places on his letterhead is misleading or not." H.Tr. at 37. In interrogatories, petitioner had asked the Administrator to provide the names of any persons who considered his letterhead statement to be misleading. The Administrator responded that petitioner, not the Administrator, would have that information.

law because the Administrator recognized that the Constitution constricts state authority to regulate nonmisleading attorney advertising.[16]

The Administrator did *not* dispute the bona fides of NBTA, or that the fact of NBTA certification was information useful to prospective consumers of legal services. To the contrary, the Administrator was willing to assume that NBTA is a legitimate organization and that certification by NBTA would provide meaningful information to consumers. No other factual assumption was reasonably possible, given the stature and reputation of NBTA. In the view of the Administrator, however, a categorical ban on *all* certification programs was the only way the State could prevent "bogus" certification groups from "popping up" and conferring meaningless certifications.[17] Thus, the Administrator argued that a flat ban on statements about certification and specialization was necessary

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[16] In the Administrator's Memorandum to the Hearing Board opposing petitioner's motion to dismiss the disciplinary charges against him, the Administrator repeatedly expressed his belief, citing decisions of this Court, that the only attorney advertising that can *constitutionally* be regulated or prohibited is advertising that is false, misleading or deceptive.

[17] The Administrator argued to the Hearing Board as follows:

> "In this case, the [state] interest is clearly the [Illinois Supreme] Court's interest in having *bogus* certification groups pop up or things that you just sign in correspondence courses, things of that nature, where the certification would be meaningless. The *Administrator doesn't argue either way about the meaningfulness of a certification by the National Board of Trial Advocacy*, but by having a *complete ban* on saying attorneys are certified or specialists, that is tailoring a substantial state interest that is protecting people from either meaningless or false information by having that ban an *entire ban* that is the best possible remedy to the situation that is before the Court." H.Tr. at 49-50 (emphasis added); (App. 36a).

as a prophylactic rule, even though the record in the present proceedings contained not a shred of evidence suggesting petitioner's letterhead posed a risk of the harms against which the rule is meant to guard.

The Hearing Board, in its "Findings of Facts," made no "particularized finding"—or even a generalized finding—that the statement was "false or misleading." *See Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. at 1920. And the Board rejected the charge that petitioner had violated D.R. 2-101(b), which prohibits all false or misleading publicity by an attorney.[18] Instead, the Board held, in its "Conclusion of Law," that the statement was misleading as a matter of law, and violated D.R. 2-105, because the Supreme Court of Illinois had not approved any form of certification: "We hold it is 'misleading' as our Supreme Court has never recognized or approved any certification process." [19] The Board gave no indication of how the absence of state approval might render the statement on petitioner's letterhead misleading, but presumably the Board acted in response to the arguments put before it by the Administrator. Thus, even though certification by the NBTA would provide meaningful information to consumers, the Administrator convinced the Board to impose a "prophylactic ban," because that prophylactic rule would block the emergence of "spurious

[18] *See* note 13 *supra*. The Administrator did not take exceptions to or appeal from rejection of his charge under Rule 2-101(b). Consequently, the only rule at issue before the Review Board and before the Illinois Supreme Court was Rule 2-105(a)(3).

[19] Report of the Hearing Panel Findings of Facts, Conclusion of Law and Recommendations of the Hearing Board, at 5; App. 20a. The Hearing Board's use of quotation marks around the word misleading is consistent with its refusal to find petitioner's letterhead statement misleading as a matter of fact.

certifying organizations whose certifications would be meaningless." [20]

3. The Ruling of the Illinois Supreme Court.

After summary affirmance by the ARDC Review Board (App. 16a), the Supreme Court of Illinois reviewed the Hearing Board's decision. The court affirmed the legal conclusions of the Hearing Board in all respects, and specifically rejected petitioner's constitutional challenges to the application of D.R. 2-105. Petitioner's statement about NBTA certification was held to be "inherently misleading" for two reasons. 534 N.E.2d at 983-985; (App. 9a). First, "the general public could be misled" into thinking that petitioner had been certified *by the State* as a civil trial specialist. Second, the statment "tacitly attests to the qualifications of the respondent as a civil trial advocate." *Id.* (emphasis added)

The court reached these conclusions notwithstanding that petitioner's letterhead unambiguously stated that he was certified by the "*National* Board of Trial Advocacy," and carefully distinguished between *certification* by this

[20] Memorandum of the Administrator in opposition to petitioner's motion to dismiss, at 5:

> "The substantial state interest involved in this situation is the protection of the public from false or misleading information. Lawyer advertising concerning the quality of legal services is inherently misleading. In addition, permitting claims of certification or specialty by attorneys in their advertising, would likely spawn spurious certifying organizations whose certifications would be meaningless. Therefore, a ban on this type of attorney advertising is appropriate.
>
> The prophylactic ban described above is the only means available to the Supreme Court of Illinois to advance its substantial state interest. Claims as to quality of legal services are not susceptible to measurement or verification. Therefore, the only possible means of regulation in this situation is to ban claims of 'certification' or 'specialty.' "

national organization and *licensure* by Illinois, Missouri, and Arizona. (J.A. 24). The opinion did not suggest how potential clients might be misled about petitioner's substantial qualifications as a civil trial advocate. No consideration was given to the possibility that the potential risks identified by the court could be controlled through a number of far less restrictive regulatory means. Nor did the court attempt to justify D.R. 2-105's blanket prohibition by identifying any substantial state interest apart from the risk of misleading potential clients.

This court granted certiorari on July 3, 1989. 109 S. Ct. 3240 (1989).

SUMMARY OF ARGUMENT

The imposition of public censure upon petitioner for his letterhead statement about NBTA certification violated his rights under the First and Fourteenth Amendments.

First, even assuming the State had the authority to regulate the expression at issue as "commercial speech," D.R. 2-105's blanket prohibition of *all* statements about certification transgresses First Amendment limitations on state regulation of commercial speech, as set for in *Board of Trustees of the State University of New York v. Fox*, 109 S. Ct. 3028 (1989). All statements about certification cannot be banned on the ground that they are "inherently misleading." As the facts of this case demonstrate, statements about certification by bona fide certifying organizations such as NBTA can provide the public with valuable information about the experience and qualifications of trial advocates. Because statements about certification are, at most, *potentially* misleading, state efforts to regulate them must be narrowly tailored to protect a substantial state interest. In the present case, the

State of Illinois cannot demonstrate that the blanket prohibition imposed by D.R. 2-105 meets this test. (Point I).

Second, on the facts of this case the State lacked the authority to regulate petitioner's letterhead as "commercial speech." This Court has defined "commercial speech" as expression that occurs in the context of proposing a commercial transaction. *Fox*, 109 S. Ct. at 3032. Petitioner's statement about certification was not made in the course of a commercial transaction. It did not appear in any advertisement, and was not part of any solicitation effort. It was, therefore, entitled to full First Amendment protection. (Point II)

Third, the ban of *all* statements about certification violates the Equal Protection Clause of the Fourteenth Amendment because it is premised on an arbitrary and irrational classification. D.R. 2-105 explicitly permits attorneys to state that they "concentrate" in legal specialities, and to state that they are patent, trademark or admiralty practitioners, irrespective of their experience and qualifications in these fields. Thus, although an attorney who has recently begun practice can publicize the potentially misleading claim that he or she "concentrates" in civil trial advocacy or is a "trademark" or "patent" lawyer, an attorney with substantial experience and qualifications like petitioner is banned from making the accurate and reliable statement that he is certified as a civil trial specialist by NBTA. (Point III)

ARGUMENT

I. THE APPLICATION OF D.R. 2-105 TO PETITIONER'S LETTERHEAD STATEMENT ABOUT NBTA CERTIFICATION VIOLATES FIRST AMENDMENT LIMITATIONS ON STATE AUTHORITY TO REGULATE COMMERCIAL SPEECH.

For the reasons set forth in Point II, *infra*, petitioner's letterhead is not properly subject to regulation as "commercial speech." The application of D.R. 2-105 to petitioner would, however, violate the First Amendment even if petitioner's letterhead were within that category of expression. The First Amendment requires state efforts to regulate commercial speech to be narrowly tailored to protect substantial state interests. *Board of Trustees of the State University of New York v. Fox*, 109 S. Ct. 3028 (1989). Respondent cannot demonstrate that the sweeping application of D.R. 2-105 to *all* attorney statements about certification, including petitioner's, meets this First Amendment standard. The present case can therefore be resolved in favor of petitioner without reaching the broader issue of the proper scope of "commercial speech." *Cf. Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

A. State Regulation Of Commercial Speech By Attorneys Must Be Narrowly Drawn And No Broader Than Reasonably Necessary To Further Substantial Interests.

This Court's recent decision in *Board of Trustees of the State University of New York v. Fox* sets forth the standards for evaluating the constitutionality of D.R. 2-105 as applied to commercial speech. *Fox* makes clear that "restrictions designed to prevent deceptive advertising must be 'narrowly drawn,' and 'no more extensive than reasonably necessary to further substantial interests.'" 109 S. Ct. at 3033 (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)) (internal citations omitted). In particular, the First Amendment requires "the government goal to be substantial, and the cost to be carefully calculated" to minimize the suppression of valuable expression. *Fox*, 109 S. Ct. at 3035.[21] This standard applies fully to commercial speech by attorneys. *See Shapiro v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. at 205.

Blanket prohibitions of commercial speech are extremely disfavored. The mere opportunity "for isolated abuses or mistakes does not justify a total ban on . . . protected commercial speech." *Shapero*, 108 S. Ct. at 1923. Government may not suppress truthful and nondeceptive advertising "simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising." *Zauderer*, 471 U.S. at 646. As this Court has repeatedly made clear:

> "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the

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[21] Although this Court held in Fox that a State regulating commercial speech need not demonstrate that it is employing the *least* restrictive means available to achieve its goals, the Court made clear that the State nonetheless must meet a substantial burden. It must "affirmatively establish" that its goal is substantial and that the means of achieving the goal is "carefully calculated" to avoid suppression of valuable speech. 109 S. Ct. at 3035. The Court "insisted" that "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful." *Id.* at 3034 (internal quotations omitted). The Court also stressed that the test for evaluating state regulation of commercial speech is "far different" from, and more demanding than, the deferential rational basis test used for Fourteenth Amendment equal protection analysis. *Id.* 3035-3036.

false, the helpful from the misleading, and the harmless from the harmful."

Id. Accord Fox, 109 S. Ct. at 3034; *Shapero*, 108 S. Ct. at 1924.

The First Amendment tolerates blanket prohibitions only in rare instances in which (a) *all* expression targeted by the regulation is inherently misleading, or (b) a complete ban is reasonably necessary to protect some other substantial state interest. *Fox*, 109 S. Ct. at 3032; *Shapero*, 108 S. Ct. at 1921; *Zauderer*, 471 U.S. at 644-645; *In re R.M.J.*, 455 U.S. at 202-203.[22] "Inherently misleading" expression necessarily and irremediably deceives its audience in a material way. This Court has been careful to distinguish between this limited category of unprotected expression and expression that merely contains the *potential* to mislead. "[T]he States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. at 203. *See also Shapero*, 108 S. Ct. at 1923. Applying these principles, this Court has consistently rejected blanket prohibitions of attorneys' commercial speech. *E.g., Shapero*, 108 S. Ct. at 1922-1924 (targeted mail solicitation); *Zauderer*, 471 U.S. at 644-649 (legal advice, illustrations); *In re R.M.J.*, 455 U.S. at 204-207 (areas of practice and bar admissions); *Bates v. State Bar of Arizona*, 433 U.S. 350, 372-374 (1977) (price advertising).

[22] *Cf. Frisby v. Schultz*, 108 S. Ct. 2495, 2502-2503 (1988):

> A statute is narrowly tailored if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-810 (1984). *A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.*

108 S. Ct. at 2502-2503 (emphasis added). *Frisby* involved the requirement that time, place and manner restrictions be narrowly tailored to avoid suppression that is not reasonably necessary to achievement of the State's interest. In *Fox*, this Court indicated that the "narrow tailoring" requirement for time, place and manner restrictions is "substantially similar" to the "narrow tailoring" requirement for regulation of commercial speech. 109 S. Ct. at 3033.

The State may use means short of outright bans to regulate *potentially* misleading commercial speech by attorneys, but any such regulation must "be narrowly crafted to serve the State's purpose[]" of preventing deception. *Zauderer*, 471 U.S. at 644; *In re R.M.J.*, 433 U.S. at 205-207. The "State bears the burden of justifying its restrictions." *Fox*, 109 S. Ct. at 3035. It must "affirmatively establish" that the regulation is narrowly tailored to vindicate a substantial interest. *Id.; see also Zauderer*, 471 U.S. at 647-648 (interest in "decorum" insufficient, no evidence of harm, no showing that narrower regulatory options insufficient); In re *R.M.J.*, 455 U.S. at 205 (no evidence of harm, no showing that narrower regulatory options insufficient).

B. Under The Controlling Standards Set Forth By This Court, The Blanket Prohibition of All Attorney Statements About Certification Contained in D.R. 2-105 Violates The First Amendment.

These principles require reversal of the judgment and order below. The State seeks to justify its prohibition of *all* attorney statements about certification—including the one contained in petitioner's letterhead—with the untenable claim that *all* such statements are "inherently misleading." But, as demonstrated in this Point, petitioner's letterhead statement that he was certified as a civil trial specialist by the National Board of Trial Advocacy was entirely accurate, and reflected substantial professional accomplishment. It is an example of precisely the type of "accurate communication by lawyers concerning their services and experiences" that will advance the public interest. 534 N.E.2d at 985 (App. 12a).[23] Moreover, as also demonstrated in this Point,

[23] *Quoting* American Bar Association Standing Committee On Ethics and Professional Responsibility Report to the House of Delegates (Draft Report), August 29, 1988, at 5.

application of D.R. 2-105 to all statements about certification is *not* a narrowly tailored means to advance a substantial state interest in protecting the public from being misled.[24] Because the State has made no effort to "distinguish[] the truthful from the false, the helpful from the misleading, and the harmless from the harmful," *Zauderer*, 471 U.S. at 646, D.R. 2-105 is thus no less unconstitutional than the blanket prohibitions struck down in *Shapero*, *Zauderer*, *In re R.M.J.* and *Bates*.

1. *Petitioner's statement about NBTA certification is not inherently misleading.*

Respondent attempts to pretermit First Amendment scrutiny of D.R. 2-105 by baldly asserting that *all* statements about certification—including petitioner's—are "inherently misleading," and can therefore be banned without any showing that the ban is narrowly tailored to vindicate a substantial state interest. This *ipse dixit* does not satisfy respondent's First Amendment burden.

This Court has repeatedly refused to condone blanket prohibitions of attorneys' commercial speech, notwithstanding state claims that the banned expression was "inherently misleading."[25] In *Bates v. State Bar of Arizona*, this Court rejected the State's assertion that routine price advertising was "inherently misleading." 433 U.S. 350, 372-373 (1977). The Court found that the State's

[24] The State has not even attempted to suggest any additional substantial interest—other than protecting the public from being misled—that might conceivably justify the blanket prohibition of D.R. 2-105. The constitutionality of D.R. 2-105 thus must be tested in terms of whether it is narrowly tailored and reasonably necessary to vindicate a substantial state interest in preventing the public from being misled.

[25] The determination whether a particular type of expression is so "inherently misleading" that it may be completely banned is one of "constitutional fact" that must be made *de novo* by this Court. *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 505-509 (1984) (collecting cases).

claim was "refuted by the record," because there—as here—the particular publication at issue presented none of the risks against which the blanket prohibition was meant to guard. *Id.* at 373. In *In re R.M.J.*, this Court rejected prophylactic rules limiting the ways attorneys could describe their fields of practice, and prohibiting advertisements of bar admissions. Because "[s]uch information is not misleading on its face," and no showing had been made that the information had in fact misled anyone, this Court held that the State could not justify its prophylactic ban. 455 U.S. at 205.

In *Zauderer*, this Court rejected the State's assertion that a blanket prohibition of attorney advertising containing legal advice was necessary because it was allegedly impossible to distinguish reliable from unreliable legal advice. This claim, the Court held, was "belied by the facts"; the expression at issue was "easily verifiable and completely accurate." 471 U.S. at 645. And in *Shapero*, this Court rejected the State's claim that a prophylactic ban of direct-mail solicitation by attorneys was necessary to protect against the "inherently misleading" nature of such solicitations. The State's argument was unsupportable because the record contained no "particularized finding" that the *advertisement at issue* was in fact misleading, and the State had shown at most the *potential* for "isolated abuses or mistakes." 108 S. Ct. at 1920, 1923.

The reasoning of these decisions controls here. The State of Illinois posited two ways in which *all* statements about certification—including petitioner's—could be misleading: (i) a statement about certification "tacitly attests" to "qualifications . . . as a civil trial advocate"; and (ii) "the general public *could* be misled" into thinking certification had been done *by the State*. 534 N.E.2d at 983-985 (emphasis added); (App. 9a). These risks are ephemeral. The State's argument that *all* statements about certification are "inherently misleading" is "re-

futed by the record in this case." *See Bates*, 433 U.S. at 373.

a. *Attorney background and qualifications.* Statements about certification do not inherently mislead the public about attorney qualifications. The opinion of the Supreme Court of Illinois in this case contains no support for the contrary conclusion. The court asserted only that petitioner's statement about NBTA certification "tacitly attests" to his experience and qualifications as a civil trial advocate. This assertion does not even remotely justify the conclusion that petitioner's statement about certification is "*inherently* misleading." The public will be misled only if the claim of NBTA certification creates a *false* impression about petitioner's background and experience as a civil trial advocate.

Petitioner's letterhead presents no such risk. The bona fides of the NBTA are not open to doubt. Certification by NBTA is a mark of genuine accomplishment, as several States already officially recognize. *See* pages 6-7 *supra*. NBTA certification—and the experience and competence to which it attests—is "easily verifiable and completely accurate" factual information. *Zauderer*, 471 U.S. at 645. Communication of the fact of NBTA certification to potential clients will enhance their ability to make informed decisions about legal representation. As in *Zauderer*, the State seeks to justify application of a blanket prohibition "notwithstanding that [the] particular advertisement has none of the vices that allegedly justify the rule." 471 U.S. at 644.

At most, attorney claims of certification might be *potentially* misleading in *other* circumstances—not before this Court—where the claim creates a false impression about an attorney's qualifications. That might be the case for claims premised on certification by a disreputable or "bogus" organization. A risk might also be present where the attorney simply claims to be "certified" without disclosing the identity of the certifying organization,

or where an attorney claims to be a "specialist" without disclosing any factual foundation for the claim. No such risk is present when attorneys make accurate statements that they are certified by bona fide credentialing organizations.

Respondent's attempted justification for this complete ban on *all* statements about certification rests on a faulty reading of this Court's dictum in *In re R.M.J.*, that claims as to the quality of legal services "might be so likely to mislead as to warrant restriction." 455 U.S. at 201. Neither *In re R.M.J.* nor any other decision of this Court suggests that all statements bearing on qualifications and experience are inherently misleading. Although this Court's decisions have

> "left open the possibility that States may prevent attorneys from making *nonverifiable* claims regarding the quality of their services, they do not permit a state to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas."

Zauderer, 471 U.S. at 640 n.9 (emphasis added).

The meaning of NBTA certification, and the fact that a practitioner is certified, are readily verifiable.[26] And

[26] The Supreme Court of Illinois made much of the fact that petitioner and *amici* differed in their descriptions of what NBTA certification denoted. This difference, however, does not materially undermine petitioner's claim. As was made clear in the brief *amicus curiae* in support of the petition for certiorari by the National Board of Trial Advocacy, NBTA had recently revised its standards, and the differences between petitioner's description and those of the *amici* simply reflect the fact that petitioner was unaware of the revisions. Moreover, satisfaction of any of the different sets of standards identified by the Illinois Supreme Court would have denoted substantial professional competence and accomplishment.

accurate statements about certification pose no risk of misleading potential clients about the background and qualifications of the certified attorney. To the extent potential clients infer that an NBTA-certified attorney has substantial qualifications in the area of civil trial advocacy, the inference will be wholly warranted; the design of NBTA certification is to identify qualified and experienced trial advocates. Indeed, one important way in which NBTA certification—and certification in the medical and mental health professions—advances the public interest is by providing the general public with objective indicia of special qualifications or experience. Accordingly, even if the State has a legitimate interest in preventing "inherently misleading" *non*verifiable statements about the quality of an attorney's services—an issue not before this Court—that interest cannot justify a ban on accurate and verifiable statements about certification by reputable, bona fide certifying organizations such as NBTA.

b. *State sponsorship.* Respondent also argues that petitioner's letterhead is "inherently misleading" because members of the public "*could* be misled" into believing that NBTA certification carries with it the imprimatur of the State of Illinois. 534 N.E.2d at 984 (emphasis added); (App. 9a). This argument is also "belied by the facts." *Zauderer*, 471 U.S. at 645. Petitioner's letterhead carefully distinguishes between certification by the *National* Board of Trial Advocacy and licensure by the *States* of Illinois, Missouri, and Arizona. The possibility that a reader would misunderstand the statement about certification by a "national" organization as implying certification by the State of Illinois is remote at best. The State offered no evidence that anyone was in fact misled in this way. Indeed, the State's claim that

NBTA certification is "inherently misleading" is substantially undermined by the fact that the Supreme Courts of Alabama and Minnesota found that publicizing NBTA certification did not pose any substantial risk of inevitably misleading consumers in the way posited by the Supreme Court of Illinois. *See Ex Parte Howell*, 487 So.2d 848 (Ala. 1986); *In re Johnson*, 341 N.W.2d 282 (Minn. 1983).

In any event, the First Amendment precludes the State from placing "an absolute prohibition" on attorney statements about certification "if the information also may be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. at 203. To ensure that the public does not erroneously assume state certification or endorsement of certifications by private organizations, Illinois might require that claims of certification be accompanied by an appropriate disclaimer.[27] The ease with which the State's interest can be vindicated by this simple requirement of *additional* disclosure makes clear that the expression at issue is not inherently and intractably misleading. *Cf. Bates v. State Bar of Arizona*, 433 U.S. at 375 ("the preferred remedy is more disclosure rather than less").

At bottom, respondent's argument is that petitioner's letterhead statement about NBTA certification is so intrinsically deceptive and lacking in value that it deserves no First Amendment protection whatsoever. As demonstrated, that argument has no merit.

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[27] Such a disclaimer might be modelled on the current letterhead practice of indicating that an attorney is licensed in more than one State. The statement about certification could be accompanied by an asterisk directing the reader to an appropriate disclaimer on the letterhead.

2. *D.R. 2-105 cannot be justified as narrowly tailored and reasonably necessary to vindicate the State's interest in preventing* potential *deception of the general public.*

Because attorney statements about NBTA certification are not inherently misleading, the comprehensive ban of D.R. 2-105 can survive First Amendment scrutiny only if the State can demonstrate that the ban is narrowly tailored to vindicate a substantial state interest. *Fox*, 109 S. Ct. at 3032-3035. The sole potential harm identified by the State in this case is the risk that the general public could be misled by statements about certification. But Respondent has not even argued that the blanket prohibition of D.R. 2-105 is a narrowly tailored means that is reasonably necessary to protect consumers from this harm.

Illinois has instead opted for, and seeks to justify, the *most* restrictive means of regulating attorney claims respecting certification. Even though it found no more than "opportunities for isolated abuses or mistakes," Illinois has imposed "a total ban on that mode of protected commercial speech." *Shapero*, 108 S. Ct. at 1923. The State has made *no* effort to "distinguish[] the truthful from the false, the helpful from the misleading, and the harmless from the harmful," but has instead outlawed all statements about certification—no matter how valuable the information they contain might be to potential clients—"simply to spare itself the trouble of distinguishing such [statements] from false or deceptive [statements]." *Zauderer*, 471 U.S. at 646. In short, D.R. 2-105 embodies precisely the vice condemned by this Court in *Shapero*, *Zauderer*, and *In re R.M.J.*

The Supreme Court of Illinois did not consider *any* of the numerous, far less sweeping regulatory measures that could protect the general public from potentially misleading claims of certification by attorneys. As demonstrated, a simple disclaimer could provide virtually complete pro-

tection against the risk of consumers incorrectly assuming that the State *itself* had certified the attorney. Yet the court gave no consideration to this regulatory option, notwithstanding this Court's clear injunction in *Bates* and *In re R.M.J.* that additional disclosure is a preferred means of accommodating First Amendment values and state regulatory goals. *Bates*, 433 U.S. at 375 ("the preferred remedy is more disclosure rather than less"); *In re R.M.J.*, 455 U.S. at 203 (ban precluded where "information may also be presented in a way that is not misleading").

The Supreme Court of Illinois failed to consider numerous other effective regulatory measures that many States have *already* adopted for protecting against attorney claims that are based on certification by bogus certifying organizations. For example, despite acknowledging that Minnesota and Alabama have established state mechanisms for review and authorization of certifying organizations "in order to protect the public from spurious agencies and meaningless certifications," 534 N.E.2d at 982; (App. 4a-6a), the court made no effort to explain why that option would not adequately protect Illinois identical interests.[28] The Supreme Courts of Minnesota and Alabama concluded that this alternative is a reasonable and narrowly tailored means that will effectively prevent deception, and for that reason invalidated blanket prohibitions identical to D.R. 2-105. *See Ex Parte Howell*, 487 So.2d 848 (Ala. 1986); *In re Johnson*, 341 N.W.2d 282 (Minn. 1983).

Nor did the court below consider the option of state-sponsored certification programs, which many States have adopted as a means to control the risk of unreliable

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[28] Connecticut and Georgia also provide mechanisms for state approval of certifying organizations. These States, as well as Minnesota and Alabama, have all officially approved NBTA certification. *See* Brief *Amicus Curiae* of the National Board of Trial Advocacy in Support of the Petition For Certiorari in No. 88-1775 at 2 n.1.

claims of certification.[29] The court devoted no attention to the option of promulgating substantive criteria certifying organizations would have to meet before attorneys could publicize the fact of certification by those organizations. And the court did not consider the possibility of a regulatory program pursuant to which advertisements containing claims of certification would be submitted for official review simultaneously with publication. Under such an approach, particular misleading statements could be subjected to discipline on a case-by-case basis. *See Shapero*, 108 S. Ct. at 1923 (submission of solicitation letters to state agency is "far less restrictive and more precise means" than blanket prohibition).

Indeed, the application of D.R. 2-105 to misleading attorney claims of certification may well be wholly gratuitous with respect to achieving the State's articulated objectives. Another Illinois attorney disciplinary rule, D.R. 2-101(b), already proscribes any "public communication" that "contain[s] any false or misleading statement or otherwise operate[s] to deceive," including communications that omit "information necessary to make the communication not misleading." Illinois certainly has the authority under D.R. 2-101(b) to act against particular certification claims that mislead the public in the ways posited by the State. In the present case, respondent's complaint against petitioner alleged that his letterhead violated D.R. 2-101(b) as well as 2-105. No violation of D.R. 2-101 was found, because petitioner's claim of NBTA certification was not shown to have been misleading as a matter of fact. But, entirely apart from D.R. 2-105, Rule 2-101 remains available as a narrowly tailored means of acting against particular claims of certification that do in fact mislead the public.

Each of these alternative regulatory schemes represents a means significantly more "narrowly tailored" than D.R.

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[29] *Id.*

2-105 to protect against potential deception of the general public. Many—such as a disclaimer requirement or promulgation of guidelines—would achieve the State's interests at minimal regulatory cost. To the extent some of these narrowly tailored options might impose additional regulatory costs, this Court has "insisted" that "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful." *Fox*, 109 S. Ct. at 3034; *accord Shapero*, 108 S. Ct. at 1924; *Zauderer*, 471 U.S. at 646. As shown in the following section, the specific speech at issue here is highly valuable, and worthy of substantial efforts at accommodation.

The State of Illinois has been unwilling to accommodate its regulatory goals and the First Amendment goal of disseminating accurate, nonmisleading information about NBTA certification. The cost of D.R. 2-105 has not been "carefully calculated" to minimize the suppression of valuable expression. To the contrary, D.R. 2-105 represents the *most* restrictive regulatory means available to prevent potential deception. But Illinois is not free to impose a blanket prohibition simply because this approach might be more convenient than the plethora of narrowly tailored options available to it. Because respondent has not met—and cannot meet—its burden of demonstrating that D.R. 2-105 is narrowly tailored to prevent potential deception respecting claims of attorney certification, the First Amendment requires that it be invalidated.

Finally, one of the state interests that purportedly justifies the sweeping ban imposed by D.R. 2-105—the interest in preventing consumers from being misled as to state sponsorship—is insubstantial in most cases. Presumably, concern arises because some members of the public may assume that a claim of certification implies state attestation to the attorney's qualifications. Where an attorney has been certified by a bogus organization,

such a misimpression may harm consumers who rely on the claim in choosing an attorney. But where—as in this case—the certifying organization is bona fide and certification is an accurate indicator of substantial experience and competence, a consumer would suffer no material harm even if he or she erroneously believed that the certification had official backing. A consumer relying on the fact of NBTA certification would receive the services of an able, experienced trial lawyer, whether or not the State was among those endorsing the certification. The State has pointed to no evidence—and there is no reason to assume—that a significant percentage of attorney claims of certification will be unreliable. Consequently, the State has not shown that its interest in preventing consumers from being "misled" in this way is sufficient to justify the blanket prohibition imposed by D.R. 2-105.[30]

C. The Blanket Prohibition Imposed by D.R. 2-105 Substantially Undermines The Interests That Require First Amendment Protection of Commercial Speech.

D.R. 2-105 undermines the core interests that are furthered by this Court's decisions recognizing substantial First Amendment protection for commercial speech. The ban imposed by Illinois deprives prospective clients of information about programs that serve to *enhance* the quality of representation an attorney can offer and that *could* help those prospective clients identify an attorney qualified to handle their particular legal problems. D.R. 2-105 also removes the incentive for noncertified lawyers to gain the experience and knowledge necessary to obtain

[30] *See Bates*, 433 U.S. at 379:

"We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward."

comparable certification. Far from being the "bogus" enterprises suggested by respondent, certification programs in trial advocacy fulfill extremely important and unmet public needs.

The Conference of Chief Justices (of the States) has squarely endorsed specialization programs "as a means to ensure competent counsel and to enable the public to select the best representation of their interests." [33] The Conference of Chief Justices acknowledged that "specialization is a means to ensure competent representation that has been reviewed intensively in recent years by enhancing the performance of the bar *and* the ability of the public to identify appropriate counsel." [32] The years later the Conference of Chief Justices approved a "Model State Court Lawyer Competence Program" that had been developed by the Conference of Chief Justices Committee on Lawyer Competence. That program is reprinted in "Promoting Lawyer Competence," 10 *State Court Journal* (Fall 1986) at 15-23. The model program expressly recommends that state supreme courts "should adopt rules that provide specific guidelines and formal structures under which attorneys may be provided . . . recognition or certification as specialists." *Id.* at 21.

Of course, the fact that a particular lawyer has been certified as a trial specialist will be of no assistance whatsoever to members of the public seeking experienced trial counsel unless that fact can be communicated to them. But as the United States noted in its *amicus* brief in *Bates*, "[u]nfortunately, however, there is not now sufficient information available to the public concerning legal services. Study upon study, author after author,

[31] Conference of Chief Justices' Resolution VII, titled "Court Recognition of State Specialization Plans," adopted by the Conference of Chief Justices Coordinating Council on Lawyer Competence at the Conference of Chief Justices Annual Meeting on August 2, 1984.

[32] *Id.* (emphasis added).

reveals the gross ignorance of the public with respect to lawyers and legal services. . . . One of the major causes of this ignorance is doubtless the ban lawyers have imposed upon the dissemination of information about their services, their prices, and even their existence." *Amicus Brief* at 24. That unfortunate fact was noted in the Court's opinion in *Bates*: "[s]tudies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services *or because of an inability to locate a competent attorney.*" 433 U.S. at 370 (emphasis added). This Court's decisions in *Bates* and later cases were designed to begin, and have begun, the process of allowing the agency of private communication to remedy these problems. But there can be little doubt that the problems persist, due in no small part to remnants of restrictive policies of the past, such as D.R. 2-105.

Illinois' prohibition of all attorney statements about certification rests on paternalistic notions that this Court's commercial speech cases reject. Like the arguments put forth to justify blanket prohibitions in other attorney commercial speech cases, Illinois' categorical ban "rests on an underestimation of the public." This Court "view[s] as dubious any justification that is based on the benefits of public ignorance." *Bates*, 433 U.S. at 375.

The consequences of state-enforced public ignorance are particularly acute in the present context. The choice of legal representation does not merely involve the satisfaction of purely private preferences—as might the choice between competing consumer products. Rather, the choice implicates important *public* interests in access to the courts, the sound administration of justice, and the vindication of constitutional, statutory and common law rights. *Cf. In re Primus*, 436 U.S. 412 (1978). The public's ignorance about the experience and qualifications of those they choose to represent them before our courts undermines these crucial interests.

Accordingly, even if petitioner's letterhead statement about NBTA certification is considered "commercial speech," the First Amendment requires reversal of the judgment and order below.

II. D.R. 2-105 CANNOT CONSTITUTIONALLY BE APPLIED TO PETITIONER'S LETTERHEAD STATEMENT ABOUT NBTA CERTIFICATION BECAUSE THAT STATEMENT IS NOT "COMMERCIAL SPEECH" AS DEFINED IN THIS COURT'S DECISIONS.

The Supreme Court of Illinois assumed without analysis that the statements on petitioner's letterhead were "commercial speech," and therefore could be regulated under the less exacting First Amendment standards applicable to that category of expression. This conclusion is in direct conflict with the standards previously set forth by this Court.[33]

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[33] The issue whether petitioner's letterhead may be regulated as commercial speech is properly before this Court. Petitioner specifically argued at every stage of the state proceedings that the application of D.R. 2-105 to his letterhead violated the First Amendment. *See* note 14, *supra*. The Illinois Supreme Court squarely considered whether the First Amendment barred application of D.R. 2-105 to petitioner, and rejected the claim. In support of his First Amendment argument, petitioner stressed the undisputed fact that his letterhead was sent only to "other lawyers and *present* clients." 534 N.E.2d at 982 (emphasis added); (App. 4a). The Supreme Court of Illinois expressly noted and rejected that argument. Thus, although petitioner did not specifically argue that his letterhead statement was not commercial speech, the holding of the court below *necessarily* resolved the issue against petitioner when it concluded—in the context of the undisputed facts—that petitioner's letterhead was properly regulated as commercial speech. Accordingly, the court below has by necessary implication decided the issue whether petitioner's letterhead can be classified as commercial speech. *See Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971). *See also Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972) (if "constitutional premise" is raised in state court, this Court can use different "method of analysis readily available to the state court"). *Cf. Dewey v. Des Moines*, 173 U.S. 193 (1899).

This Court has repeatedly defined "commercial speech" by reference to " 'the "commonsense" distinction between speech proposing a commercial transaction . . . and other varieties of speech.' " *Central Hudson Gas & Elec. v. Public Service Comm'n of New York*, 447 U.S. 557, 562 (1980) (citations omitted); *see also Posadas de Puerto Rico Assocs. v. Tourism Company of Puerto Rico*, 478 U.S. 328, 340 (1986); *Virginia State Board of Pharmacy v. Virginai Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). This Court's explication of commercial speech standards in *Board of Trustees of The State University of New York v. Fox* makes clear the continuing applicability of this definition. 109 S. Ct. at 3032.

The expression at issue in this case—petitioner's accurate letterhead statement that he is certified as civil trial specialist by NBTA—does not itself propose a commercial transaction, and was not made in the context of proposing a commercial transaction. The communication that triggered the disciplinary proceedings against petitioner was a letter by him to clients he was representing in proceedings before the ARDC, which came to the attention of the ARDC administrator. The only communications by petitioner submitted in evidence at his disciplinary hearing were that letter and a subsequent letter by him to the ARDC. The second letter responded to the ARDC's notification that petitioner was, because of that first letter, the subject of a disciplinary investigation. In neither of those letters did petitioner propose that his services be retained. To the contrary, petitioner was simply exercising the right—itself protected by the First Amendment—to advise clients concerning charges brought by a government tribunal and to respond to charges against him made by that tribunal.

At petitioner's disciplinary hearing, the Administrator of the ARDC did not claim or attempt to prove that petitioner had used his letterhead, or the statement that he had been certified as a civil trial specialist by the NBTA,

as part of a general advertising campaign, or in any effort to solicit legal business from the general public or from any individual. The Administrator was content to establish that, in addition to his two communications with the ARDC, petitioner had used his letterhead to "correspond with other attorneys," and "in the ordinary course of [petitioner's] business of practicing law." H.Tr. at 21; (App. 25a).

Thus, there was no claim or evidence that petitioner's letterhead had ever been mailed to any layman who was not already a client, or that petitioner had ever used that letterhead, or the statement concerning certification by the NBTA, in the yellow pages, or in any advertisements, brochures, or other types of printed materials, and petitioner testified that he had not. The Supreme Court of Illinois, though noting these facts, apparently considered them immaterial. 534 N.E.2d at 982; (App. 4a).

In disciplining petitioner notwithstanding these facts, the court below extended the boundary of regulable commercial speech far beyond any recognized by this Court. *Every* commercial speech case concerning attorneys decided by this Court has involved advertising or solicitation that proposed a commercial transaction. *See, e.g., Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988) (solicitation letters to potential clients); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (advertisement); *In re R.M.J.*, 455 U.S. 191 (1982) (advertisements); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (personal solicitation); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (price advertising).

That is not to say that statements about certification, or attorney letterheads generally, could *never* be regulable as commercial speech. Context is crucial. If petitioner's claim of NBTA certification had appeared in the Yellow Pages or in a newspaper advertisement, it certainly would be regulable as commercial speech. Simi-

larly, if petitioner's letterhead were used in the course of direct-mail solicitation of the type at issue in *Shapero*, a State would obviously possess the authority to regulate all statements in the letterhead as commercial speech. Where the letterhead statement has not been used in the course of a direct effort to obtain clients, however, the rationale for treating the expression as commercial speech is not present.

The mere fact that petitioner's letterhead statement might inure indirectly to his financial benefit cannot justify classifying the statement as commercial speech. *See Riley v. National Fed'n of the Blind of North Carolina*, 108 S. Ct. 2667, 2677 (1988). Adoption of so amorphous a standard marking the bounds of "commercial speech" would give rise to intractable problems of interpretation. An attorney's participation in bar association and civic activities will often be motivated in part by a desire to enhance professional opportunities by acquainting others in the profession and the community with the attorney's special knowledge and expertise. Even the display in an attorney's office of diplomas, certificates of bar admission, or photographs memorializing a judicial clerkship, might fall within the ambit of such a definition.

This Court has delineated a straightforward, "commonsense" definition of commercial speech: expression that occurs in the context of proposing a commercial transaction. Application of that definition to the present case requires the conclusion that petitioner's letterhead statement could not be subjected to regulation as commercial speech. The definitional reworking required to bring petitioner's letterhead within the ambit of "commercial speech" would cut the doctrine loose from its original "commonsense" moorings and give rise to insuperable problems of interpretation and application in future cases. Accordingly, this Court should hold that petitioner's letterhead statement about NBTA certification

is not regulable as commercial speech.[34] Respondent has not even argued that this type of noncommercial speech can be banned, so the judgment below should be reversed for this reason as well.

III. D.R. 2-105 VIOLATES THE EQUAL PROTECTION CLAUSE AS APPLIED TO PETITIONER BECAUSE THE BLANKET PROHIBITION OF ATTORNEY STATEMENTS ABOUT CERTIFICATION IS IRRATIONAL AND ARBITRARY IN LIGHT OF THE FACT THAT ATTORNEYS CAN COMMUNICATE VIRTUALLY IDENTICAL INFORMATION SO LONG AS THEY USE SLIGHTLY DIFFERENT LANGUAGE.

D.R. 2-105 also violates the Equal Protection Clause of the Fourteenth Amendment. The classification the rule draws between impermissible statements about specialization or certification and permissible statements about fields of concentration and particular specialties is utterly irrational and furthers no legitimate State interest. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

In Illinois, attorneys are explicitly *permitted* to make statements that they are patent, trademark or admiralty lawyers. They are also explicitly permitted to say they "concentrate" their practice in specialty areas (including, presumably, civil trial advoacy). And they may make such statements without fulfilling any state or private criteria demonstrating special competence. Both the specific statements about specialty areas and general statements that attorneys concentrate in specific fields are factual statements from which prospective clients can and will

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[34] The statement about NBTA certification at issue here has value wholly apart from any commercial benefit it might bring to a certified attorney. For example, expression publicizing NBTA certification might serve to enhance an attorney's standing in the legal or political community, or bring to the attention of other practitioners the possibility that they might obtain certification from NBTA or similar organizations.

draw inferences about the likely quality of an attorney's services, or the attorney's experience. A client with a tax problem, for example, will be more likely to pick an attorney who holds herself out as "concentrating" in tax because the client will reasonably assume that the attorney is better able to handle a tax problem than a lawyer with no experience in the field. In this respect, statements about admiralty, trademark or patent law, and statements of concentration in other fields, are indistinguishable in all relevant respects from the statement that petitioner is certified by the NBTA as a civil trial specialist.

Indeed, the statement at issue in the present case is *more* reliable than those permitted by D.R. 2-105 because NBTA's rigorous requirements for certification provide significant assurance that a certified attorney is in fact exceptionally qualified, whereas vague statements about "concentration" contain no such implicit assurance. For example, under D.R. 2-105 an attorney could permissibly advertise one day after admission to the bar that he or she "concentrates" in civil trial advocacy, but could *never* advertise the fact of NBTA certification—even though NBTA certification requires "concentration" of at least 30% of the attorney's professional time during each of the five years preceding application for certification.[35]

Accordingly, the distinction drawn in D.R. 2-105 between impermissible claims of certification or specialization and permissible statements about admiralty, patent and trademark law, and about concentration in a particular field, is utterly irrational, and violative of the Equal Protection clause of the Fourteenth Amendment.

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[35] Furthermore, D.R. 2-101(b) already aims specifically at misleading attorney advertising. To the extent attorney claims of specialization or certification are potentially misleading, Illinois has ample authority under this rule to punish violators. "The existence of these provisions necessarily casts considerable doubt upon the proposition that . . . [the rule] could rationally have been intended to prevent those very same abuses." *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 536-537 (1973).

CONCLUSION

For the foregoing reasons, the judgment and order of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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No. 88-1775

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GARY E. PEEL,

Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT

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48P

QUESTIONS PRESENTED

I. Whether a statement on Petitioner's letterhead which holds him out as being a "Certified Civil Trial Specialist" is commercial speech?

II. Whether the First Amendment to the Constitution of the United States prohibits the Supreme Court of Illinois from disciplining an attorney for holding himself out as being a "Certified Civil Trial Specialist"?

III. Whether the Equal Protection Clause of the Fourteenth Amendment permits the application of a blanket prohibition of Petitioner's statement when attorneys may disseminate information concerning the areas of law in which they practice?

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ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENT

Respondent Attorney Registration and Disciplinary Commission of Illinois respectfully prays that this Court affirm the Order and Judgment of the Supreme Court of Illinois dated February 2, 1989.

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Section 16 of the Constitution of the State of Illinois (1970) provides, in part:

> General administrative and supervisory authority over all [Illinois] courts is vested in the Supreme Court [of Illinois] and shall be exercised by the Chief Justice in accordance with its rules.

Rule 2-101(b) of the Illinois Code of Professional Responsibility (79 Ill.2d R. Art. VIII, 2-101(b) (1980)) provides:

> Such communication [publicity and advertising] shall contain all information necessary to make the communication not misleading and shall not contain any false or misleading statement or otherwise operate to deceive.

STATEMENT OF THE CASE

The facts of this matter are simple and undisputed. *See, Petition for a Writ of Certiorari to the Supreme Court of Illinois* (Pet.) at 3. In 1968, Petitioner was licensed to practice law in the State of Illinois and he is still so licensed. Hearing Transcript (Hr.) at 23; Pet. at 28a. In 1981, Petitioner was certified by the National Board of Trial Advocacy (NBTA) as a civil trial specialist. Hr. at 26; Pet. at 30a.

Beginning in 1983 and continuing to the present, Petitioner has placed the statement "Certified Civil Trial Specialist by the National Board of Trial Advocacy" on his professional letterhead which he uses during the ordinary course of his law practice. Hr. at 20-21; Pet. at 26a-27a.

On or about April 15, 1986, Petitioner received a letter from the Administrator of the Attorney Registration and Disciplinary Commission (hereinafter, "the Administrator") informing him that an investigation had been initiated concerning his use of the statement "Certified Civil Trial Specialist" on his letterhead. Hr. at 19; Pet. at 26a. Petitioner was apprised of the Administrator's concern that his conduct violated Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility. Petitioner was requested to respond, in writing, to the charge. Adm. Ex. 2; Hr. at 19-20; *Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Illinois* (Response) at 2a. Respondent responded to this letter on April 28, 1989. Adm. Ex. 3; Hr. at 21-22; Pet. at 22a-24a.

On April 9, 1987, the Administrator filed a complaint against Petitioner with the Hearing Board of the Attorney Registration and Disciplinary Commission alleging, in part, that Petitioner's letterhead violated Rule 2-105(a)(3). Joint Appendix (J.A.) at 3-4. On August 25, 1987, the Hearing Board issued its report. The Board found that Petitioner had violated Rule 2-105(a)(3) and held additionally, "[Petitioner's conduct] is 'misleading' as our Supreme Court has never recognized or approved any certification process." The Board recommended that Petitioner be publicly censured. Pet. at 20a.

Petitioner filed exceptions to the report of the Hearing Board, and on February 17, 1989, the Review Board of the Attorney Registration and Disciplinary Commission filed a report concurring with the findings of fact and conclusions of law of the Hearing Board and recommending that Petitioner be publicly censured. Pet. at 16a. The Review Board is the appellate board of the Attorney Registration and Disciplinary Commission. Either party may seek, as a matter of right, the review of any recommendation of the Hearing Board. *See* 107 Ill.2d R. 753(e) (1985).

Petitioner filed exceptions to the report and recommendation of the Review Board with the Supreme Court of Illinois. An attorney may except to a decision of the Re-

view Board as a matter of right, if disciplinary action is recommended. *See* 107 Ill.2d R. 753(e)(4) and (5) (1985). On February 2, 1989, the Supreme Court of Illinois issued its opinion in this matter. Pet. at 1a-15a. The Court rejected Petitioner's First Amendment (Pet. at 8a) and Equal Protection (Pet. at 14a) arguments and ordered that Petitioner be publicly censured for his violation of Rule 2-105(a)(3). Pet. at 15a.

The Court found that Petitioner's conduct was misleading for three reasons. The first being that Petitioner's claim impinges upon the inherent authority of the Supreme Court of Illinois to set qualifications for the practice of law. Pet. at 9. The second reason was that his statement leads a reader to believe that the State has sanctioned his claim. *Id.* The third reason was that Petitioner's statement relates to the quality of services he believes he provides. *Id.*

On February 21, 1989, the Supreme Court of Illinois entered an order staying its mandate in this matter, pending Petitioner's appeal to this Court. On May 2, 1989, Petitioner filed with this Court his *Petition for a Writ of Certiorari to the Supreme Court of Illinois.* On July 3, 1989, this Court entered an order granting certiorari.

SUMMARY OF ARGUMENT

Petitioner's argument that his statement concerning certification by a private bar association is not commercial speech has not been properly presented for review. Therefore, this Court should follow the Supreme Court of Illinois and analyze Petitioner's statement as commercial speech.

Regardless, Petitioner's statement that he is a certified civil trial specialist is commercial speech as defined by this Court. In addition to statements which directly propose a commercial transaction, statements which implicitly propose a commercial transaction are commercial speech. Petitioner's statement makes an implicit proposal for a commercial transaction. Therefore, it is commercial speech.

In order to review the First Amendment arguments made by Petitioner, it is important to understand the history of the rules related to attorney advertising in Illinois. Prior to the 1970's, lawyer advertising was strictly limited. In 1976, this Court held that commercial speech was entitled to a limited degree of protection by the First Amendment. In 1977, this protection was extended to attorney advertising. In 1980, the Supreme Court of Illinois promulgated a code of professional conduct in which rules concerning attorney advertising were adopted. Pursuant to the Code, the principal limit placed on attorney advertising was that it not be false, deceptive or misleading. The State encouraged the free flow of commercial information to consumers.

Illinois does prohibit statements in attorney advertising which are inherently misleading. Rule 2-105(a)(3) of the Code prohibits Illinois attorneys from holding themselves out as being either certified or a specialist. Such claims lead the public to believe that the speaker is specially certified or licensed to practice in a certain area of the law by the Supreme Court of Illinois.

In response to Petitioner's First Amendment arguments, a four-part test exists to determine whether state regulation violates the constitutional protection afforded commercial speech. The first part of the test holds that if the speech in question is inherently misleading, the other three parts of the test do not apply. In addition, if a claim

on its face is inherently misleading, the state does not have to prove through direct evidence that the speech actually misled a member of the public.

Petitioner's statement is inherently misleading and can be prohibited for three reasons. First, Petitioner's statement impinges upon the inherent authority of the Supreme Court of Illinois to regulate the practice of law. Second, Petitioner's statement leads the public to believe that the State has sanctioned his claim. Third, the statement contains information concerning the quality of services Petitioner believes he provides.

Finally, the State is not obligated to require that Petitioner include a disclaimer with his statement because the statement is inherently misleading.

In response to Petitioner's Equal Protection argument, Petitioner may be prohibited from holding himself out as being a "Certified Civil Trial Specialist" while attorneys may state that they "limit their practice to" or "concentrate their practice in" any area or field of law in which they practice. This is permissible because the words "limit" and "concentrate" do not connote official sanction. In addition, a blanket prohibition is not objectionable simply because attorneys who accept cases in the areas of admiralty, trademark and patent law can disseminate the specific statements listed in Rules 2-105(a)(1) and (2). Again, the justification for this rule is that none of the specific statements set forth in Rules 2-105(a)(1) and (2) contain the inherently misleading terms "certified" or "specialist."

For the reasons set forth above, the judgment and order of the Supreme Court of Illinois should be affirmed.

ARGUMENT

I.

A STATEMENT ON PETITIONER'S LETTERHEAD WHICH HOLDS HIM OUT AS BEING A "CERTIFIED CIVIL TRIAL SPECIALIST" IS COMMERCIAL SPEECH.

Petitioner's argument that his statement concerning certification by a private bar association is not commercial speech has not been properly presented for review. Therefore, this Court should follow the Supreme Court of Illinois and analyze Petitioner's statement as commercial speech.

Regardless, Petitioner's statement that he is a certified civil trial specialist is commercial speech as defined by this Court. In addition to statements which directly propose a commercial transaction, statements which implicitly propose a commercial transaction are commercial speech. Petitioner's statement makes an implicit proposal for a commercial transaction. Therefore, it is commercial speech.

A. Petitioner's Argument That His Statement Is Not Commercial Speech Has Not Been Properly Presented For Review.

Petitioner argues for the first time before this Court that a statement on his letterhead that he is a certified trial specialist is not commercial speech. Petitioner has never raised this issue before. The commercial nature of the statement on his letterhead was never questioned, argued or briefed. At all prior stages of this proceeding, Petitioner asserted that his statement was constitutionally protected commercial speech. This contention is supported

by a review of the record in this matter. Petitioner has thus failed to properly preserve this issue for review.[1]

During the state court proceeding, Petitioner defended his statement by relying on commercial speech decisions. In 1986, Petitioner was notified by the Administrator that his statement may have been in violation of Rule 2-105(a)(3). Petitioner answered this charge by noting that his statement comported with commercial speech cases decided by this Court in the attorney advertising area. Citing *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and *In re R.M.J.*, 455 U.S. 191 (1982), Petitioner stated that he did "[n]ot believe that Rule 2-105(a)(3) survives these United States Supreme Court decisions." Adm. Ex. 3; Hr. at 21.

Before the Review Board and the Supreme Court of Illinois, Petitioner and the *amici* who filed briefs supporting his position continued to rely on this Court's commercial speech decisions. Neither Petitioner or the *amici* ever argued that his statement was not commercial speech.[2]

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[1] As argued below (*see* Sec. I(B), *infra*), the record shows that Petitioner's statement is commercial speech. This evidence was introduced during the hearing in this matter by the Administrator. As Petitioner did not argue that his statement was not commercial speech, he did not present evidence tending to show that his statement was not commercial speech. Therefore, the Supreme Court of Illinois' implicit determination that Petitioner's statement is commercial speech was proven by clear and convincing evidence, the standard of proof in Illinois attorney disciplinary cases (*see* 79 Ill.2d R. 753(c)(6) (1980)). Such a finding is not against the manifest weight of the evidence.

[2] *See, e.g.*, Petitioner's *Motion to Dismiss* before the Hearing Board of the Attorney Registration and Disciplinary Commission; *Brief of Intervenor or Amicus Curiae* before the Review Board of the Attorney Registration and Disciplinary Commission (which brief, filed by the Illinois Society of the National Board of Trial Advocacy, was adopted by Petitioner as his brief before the Review Board); *Brief and Argument of the Respondent (Petitioner)*

(Footnote continued on following page)

The United States Supreme Court will not decide federal constitutional issues raised for the first time on review of a state court decision. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). The justification for this rule is that questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. *Id.* at 439.

In the case at bar, the record is inadequate to determine that Petitioner's statement is not commercial speech. Petitioner presented no evidence that his speech was not commercial in nature. In fact, the only evidence presented on this issue was by the Administrator who proved that Petitioner circulated his letterhead to clients and other attorneys during the ordinary course of his law practice. Hr. at 21; Pet. at 26a. Petitioner admits that referrals from other attorneys constitute a substantial portion of his business. Pet. at 17. This evidence tends to prove that Petitioner's stationery is commercial in nature.

Petitioner never questioned the Administrator's position that the claim on his letterhead was commercial speech. Petitioner never argued or briefed the issue during the course of the state disciplinary proceeding. Therefore, the Administrator never had an opportunity to present rebuttal evidence concerning this issue or answer any of the arguments Petitioner has raised for the first time before this Court. In addition, Petitioner foreclosed active debate on the issue by defending his statement as if it was commercial speech.

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[2] *continued*
in the Supreme Court of Illinois; *Reply Brief and Argument of the Respondent (Petitioner)* in the Supreme Court of Illinois; *Brief of Amicus Curiae National Board of Trial Advocacy in the Supreme Court of Illinois*; and *Brief of Amicus Curiae Association of Trial Lawyers of America* in the Supreme Court of Illinois.

For the reasons set forth above, an inadequate record is presented for determining that Petitioner's statement is not commercial speech. Therefore, Petitioner has not properly presented the issue for review. The Illinois Court's determination that Petitioner's statement is commercial speech should not be disturbed.[3]

B. Regardless Of Whether Petitioner Has Properly Presented The Issue, Petitioner's Statement Concerning Certification By A Private Bar Association Is Commercial Speech.

Speech which directly proposes a commercial transaction can be regulated as commercial speech. Petitioner suggests, however, that his statement does not directly propose a commercial transaction. Therefore, he argues, his statement is not commercial speech.

Petitioner's reading of this Court's rule is too narrow. The decisions of this Court provide that, in addition to statements which directly propose a commercial transaction, statements which implicitly propose a commercial transaction constitute commercial speech. Using this definition, Petitioner's statement is commercial speech.

[3] This Court has held that when an issue is "only an enlargement of one mentioned [below]," that the new issue raised may be properly decided by this Court. *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899). In this matter, the question of whether or not Petitioner's statement is commercial speech is not an enlargement of the constitutional issue raised by Petitioner below. Therefore, the Court should decline to review the issue of whether Petitioner's statement is commercial speech. *See, also, Morrison v. Watson*, 154 U.S. 111, 115 (1894); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940); *Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972); and *Illinois v. Gates*, 462 U.S. 213, 217-224 (1983).

1. Petitioner's Definition Of Commercial Speech Is Too Narrow In That The Decisions Of This Court Recognize That Statements Which Implicitly Propose A Commercial Transaction Constitute Commercial Speech.

Petitioner cites this Court's decision in *Central Hudson Gas & Electric v. Public Services Commission of New York*, 447 U.S. 557 (1980), for the rule that commercial speech is defined by the "common sense" distinction between speech "proposing a commercial transaction" and other types of speech. *Brief for Petitioner* at 34. Petitioner cites this Court's recent decision in *Board of Trustees of the State University of New York v. Fox*, 109 S.Ct, 3028 (1989), to demonstrate the continuing applicability of this definition. *Brief for Petitioner* at 34. Petitioner, using the definition set forth in *Central Hudson*, argues that his statement is not commercial speech because the Administrator presented no evidence that Petitioner disseminates his stationery to solicit prospective clients as part of a general advertising campaign. *Brief for Petitioner* at 34-35. Petitioner's argument is in error.

This Court has never intended to limit the definition of commercial speech only to those statements which explicitly propose a commercial transaction. Such a rule would lead to ridiculous results.[4] Instead, statements which implicitly propose commercial transactions can also be categorized as commercial speech.

This Court's decision in *Friedman v. Rogers*, 440 U.S. 1 (1979), illustrates this rule. In *Rogers*, the Court held that the use of a trade name by an optometrist is a form of commercial speech. This Court held:

[4] *See Brief for the Federal Trade Commission As Amicus Curiae* at 11, n.9.

> Once a trade name has been in use for some time, it may serve to identify an optometrical practice and also to convey information about the type, price and quality of services offered for sale in that practice. In each role, the trade name is used as part of a proposal of a commercial transaction. Like the pharmacist who desired to advertise his prices in *Virginia Pharmacy* (*Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976)), the optometrist who uses a trade name "does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters." *Id.*, at 761. His purpose is strictly business. The use of trade names in connection with optometrical practice, then, is a form of commercial speech and nothing more.

Id., at 11.

A trade name does not explicitly propose a commercial transaction. Yet, as determined by this Court, a trade name can implicitly convey information about the type, price and quality of a service offered for sale. Such speech is strictly business. Therefore, it can be regulated as commercial speech even though it does not explicity propose a commercial transaction.[5]

[5] This rule is supported by this Court's decision in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). In *Youngs Drug Products*, the Court found that informational pamphlets distributed by a contraceptive company which contained references to that company's products constituted commercial speech, even though the pamphlets did not explicitly propose a commercial transaction. The Court reasoned that the manufacturer, by reason of its large share of the market, would likely receive a direct financial benefit through promotion of products of a type which the company produced. Therefore, even though an explicit proposal was not made, the pamphlets were held to be commercial speech. *Id.*, at 66-67.

2. Petitioner's Statement Concerning Certification By A Private Bar Association Implicitly Proposes A Commercial Transaction And Is Commercial Speech.

A common sense analysis of Petitioner's statement leads to a conclusion that it implicitly proposes a commercial transaction. Just as the trade name in *Rogers*, 440 U.S. 1, Petitioner's statement is strictly business. Petitioner's statement conveys information about the quality of the services he believes he provides. *See* Sec. II (C)(3), *infra*. Petitioner circulates his letterhead during the "ordinary course" of his law practice. Further, Petitioner uses his letterhead to correspond with clients and other attorneys. Hr. at 21; Pet. at 26a. Thus, Petitioner's statement on his letterhead is commercial speech.

A recent empirical study has found that most attorneys in Illinois, at least in the Chicago area, do not rely on direct commercial advertising to solicit legal business. Davis, Gupta, Rylander and Youngblood, *Attitude and Opinions on Marketing Legal Services: A Survey of Lawyers in Private Practice in Chicago*, 2 Geo. J. Legal Ethics 743, 751-752 (1989).[6] Instead, attorneys utilize referrals from other attorneys and clients to generate business. The conclusion of this study supports a finding that most

[6] Direct attorney advertising is that commercial speech sanctioned by the Supreme Court of Illinois. An attorney may publicize legal services through any commercial publicity or other form of public communication including, but not limited to, newspaper, magazine, telephone directory, radio and television. 107 Ill.2d R. Art. VIII, 2-101 (1985). In addition, lawyers may initiate contact with a prospective client by written communication or mailings which comply with Rules 2-103(b) and (e) of the Illinois Code of Professional Responsibility (107 Ill.2d R. Art. VIII, 2-103(b) and (e) (1985) and *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988). Lawyers may not engage in activity constituting private solicitation of legal services as defined by existing ethical standards. 120 Ill.2d R. Art. VIII, 2-103 (as amended, effective April 10, 1987).

attorneys must rely on their contacts within the community to generate a flow of business. *See Bates*, 433 U.S. at 378. These contacts include lawyers and clients who receive correspondence from Petitioner.

Petitioner's statement represents him to be a specially qualified civil litigator. Petitioner asserts that he has certain qualifications which other lawyers do not possess. Common sense dictates that this self-designated qualification helps Petitioner secure new clients, or at least the referral of new clients, from attorneys who receive his letterhead. In fact, Petitioner admits that "referrals by other lawyers constitute a substantial portion of [my] legal business." Pet. at 17. In addition, it is not unreasonable to conclude that existing clients, believing their attorney specially qualified, might refer friends, coworkers and acquaintances to Petitioner for civil litigation matters based upon his representations concerning certification and specialization. Existing clients themselves may continue an ongoing relationship with Petitioner because of his claimed qualifications or even bring future legal problems to Petitioner for resolution.[7]

Petitioner's statement of certification and specialization need not be as explicit as typical advertisements that appear in the mass media. The substance of the commercial speech contained on Petitioner's letterhead is a subtler form of advertising which is functionally more effective. Petitioner has the direct attention of the recipient of the message. Therefore, Petitioner's statement is at least as effective as most advertisements which unabashedly propose a commercial transaction.

[7] *See Brief for the Federal Trade Commission As Amicus Curiae* at 15, n.12, concerning the Federal Trade Commission's experience with claims which induce consumers to continue their relationship with merchandisers of goods.

In that Petitioner's letterhead is commercial speech, his statement concerning certification and specialization should not be afforded the full protection non-commercial speech receives under the First Amendment. This Court should affirm the state court decision by determining that Petitioner's statement is commercial speech.

II.

THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PERMITS THE SUPREME COURT OF ILLINOIS TO DISCIPLINE AN ATTORNEY FOR HOLDING HIMSELF OUT AS BEING A "CERTIFIED CIVIL TRIAL SPECIALIST" BECAUSE SUCH A STATEMENT IS INHERENTLY MISLEADING.

Prior to the 1970's, lawyer advertising was strictly limited. In 1976, this Court held that commercial speech was entitled to a limited degree of protection by the First Amendment. In 1977, this protection was extended to attorney advertising. In 1980, the Supreme Court of Illinois promulgated a code of professional conduct in which rules concerning attorney advertising were adopted. Pursuant to the Code, the principal limit placed on advertising was that it not be false, deceptive or misleading. The State encouraged the free flow of commercial information to consumers.

Illinois does prohibit statements in advertising which are inherently misleading. Rule 2-105(a)(3) of the Code prohibits Illinois attorneys from holding themselves out as being either certified or a specialist. Such claims lead the public to believe that the speaker is specially certified or licensed to practice in a certain area of the law by the Supreme Court of Illinois.

A four-part test exists to determine whether state regulation violates the constitutional protection afforded com-

mercial speech. The first part of the test holds that if the speech in question is inherently misleading, the other three parts of the test do not apply. In addition, if a claim on its face is inherently misleading, the state does not have to prove through direct evidence that the speech actually misled a member of the public.

Petitioner's statement is inherently misleading and can be prohibited for three reasons. First, Petitioner's statement impinges upon the inherent authority of the Supreme Court of Illinois to regulate the practice of law. Second, Petitioner's statement leads the public to believe that the State has sanctioned his claim. Third, the statement contains information concerning the quality of services Petitioner believes he provides.

Finally, the State is not obligated to require that Petitioner include a disclaimer with his statement because the statement is inherently misleading.

A. The History Of Attorney Advertising And Rule 2-105(a)(3) In Illinois.

Prior to 1977, lawyer advertising was strictly and broadly forbidden throughout the country. Attorneys were generally allowed only to distribute simple business cards, place their name in telephone directories and include their name on certain officially sanctioned law lists. Wolfram, *Modern Legal Ethics*, 775-778 (1986). *See also* Illinois State Bar Association Canons of Professional Ethics, Canon 27 (1937); Chicago Bar Association Canons of Professional Ethics, Canon 27, 27A (1937).

In 1976, this Court held that professional pharmacists could advertise price information even though their interest was purely economic. The Court found that this type of commercial speech is still entitled to a certain

lesser degree of protection under the First Amendment. *Virginia Pharmacy*, 425 U.S. at 761-765. This Court based this rule not so much on the advertiser's right to speak, but society's strong interest in receiving a free flow of commercial information. *Id.* at 764.

In 1977, this Court extended the rule in *Virginia Pharmacy* to attorney advertising, and held that attorney advertising could not be subjected to a blanket prohibition. *Bates*, 433 U.S. at 384. The Court held that attorneys had the right to advertise prices at which certain routine services would be performed. *Id.* at 383. The Court rejected arguments that such advertising would have an adverse effect upon professionalism, be inherently misleading, affect the administration of justice, have an undesirable economic effect on the profession, affect the quality of legal services or be difficult for the states to regulate. *Id.* at 368-379. Yet the Court announced that false, deceptive or misleading advertising could be restrained by the states. *Id.* at 384.

In 1980, the Supreme Court of Illinois adopted the Illinois Code of Professional Responsibility. 79 Ill.2d R. Art. VIII (1980).[8] In promulgating this Code, the State recog-

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[8] On June 3, 1980, the Supreme Court of Illinois adopted the Illinois Code of Professional Responsibility effective July 1, 1980. With revisions and amendments, the 1977 American Bar Association Model Code of Professional Responsibility served as the basis of the new Code, both as to form and substance. 79 Ill.2d R. Art. VIII, Preface, Committee Commentary (1980). The advertising guidelines adopted by the State, however, constituted a clear departure from the rules promulgated by the American Bar Association. *Id.* at Canon 2, Committee Commentary. Illinois acknowledged the First Amendment commercial speech concerns articulated in *Bates*, 433 U.S. 350. In adopting the Code, the State noted that:

> Limiting advertising . . . reflects an antagonism to lawyer advertising on grounds substantially rejected by the *Bates*

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nized the constitutional protections which had been extended to attorney advertising. The Code permits a wide range of advertising options, as to both the manner and content of attorney advertising.[9] As noted by the committee which drafted the Code:

[8] *continued*

decision. To cut short experimentation with lawyer advertising at the preliminary stage could preclude the discovery of those techniques which will most effectively inform the public of the "availability and terms" of legal services.

79 Ill.2d R. Art. VIII, Canon 2, Committee Commentary (1980).

[9] As noted in footnote 6, *supra*, great latitude is allowed the practitioner as to the mode of public communication which can be utilized for advertising purposes. Moreover, Illinois allows a lawyer to communicate the following types of information:

(1) the name of the lawyer;
(2) the lawyer's address and telephone number;
(3) the educational and other background of the lawyer;
(4) the basis on which the lawyer's fees are determined (including prices for specified types of matters for which the lawyer is prepared to perform the necessary work for the client at a stated price, hourly rates, or contingent-fee arrangements), and available credit or other methods of payment;
(5) a description of the types of legal matters in which the lawyer will accept employment and a statement as to whether the lawyer concentrates or limits his practice in one or more particular fields of law;
(6) the lawyer's foreign language ability;
(7) the names and addresses of references and, with their consent, names of clients regularly represented; testimonials of clients, however, as to the lawyer's professional skills or the quality of professional services rendered should not be publicized; and
(8) other information about the lawyer, the lawyer's practice, or the types of legal matters in which the lawyer will accept employment, which a reasonable person might regard as relevant in determining whether to seek the lawyer's services.

79 Ill.2d R. Art. VIII, 2-101(a) (1980). As noted by the State when the rule was adopted in 1980, it is impossible to predict what kinds of information will ultimately prove to be most helpful to potential clients. By not limiting advertising to specified items, the rule

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> [O]pportunities for lawyer advertising should be substantial. Because the lawyer's first amendment rights, the consumer's right to know, and the individual's access to legal services are all involved, restrictions on lawyer advertising should be imposed only to the extent they can be specifically justified to protect the public. Accordingly, the present code does not attempt to list exhaustively the type of information which may be included in advertisements. Nor does it contain detailed and specific prohibitions. Rather, it places primary emphasis, in Rule 2-101(b), on the requirement that any advertisement, regardless of format or content, be true, complete and not misleading.

Id. at Canon 2, Committee Commentary. There is little doubt that Illinois has encouraged the free flow of commercial information. The State did, however, set certain limits on attorney advertising.

Exercising its inherent authority to regulate the practice of law, the Court adopted Rule 2-105(a)(3), the subject of this proceeding. Rule 2-105(a)(3) prohibits attorneys from holding themselves out as being either certified or a specialist. The Committee Comments to Rule 2-105(a)(3) clearly set forth the justification for the rule. "Because the Illinois Supreme Court has not provided for the licensing of lawyers as specialists, care must be taken not to indicate in any way that a lawyer has been certified as a specialist." 79 Ill.2d R. Art. VIII, Canon 2, Committee Commentary (1980).

[9] *continued*

is intended to promote those kinds of disclosures which respond to the desires and needs of consumers of legal services. *Id.*, at Canon 2, Committee Commentary. It is clear that Illinois has taken reasonable steps to ensure the free flow of truthful consumer information. Petitioner's claim that Illinois fosters public ignorance because of its advertising guidelines is wrong. *See Brief for Petitioner*, at 32.

Notwithstanding this exception, wide latitude is granted the attorney seeking to advertise an area of practice. Rule 2-105(a)(3) permits an attorney to "specify or designate *any* area or field of law which he . . . concentrates or limits his . . . practice." (Emphasis added.) The comments to this rule provide that "[s]tatements that a lawyer's practice is 'limited' to certain areas or that the practice is 'concentrated' in those areas provide important information to the public without implying that the lawyer is licensed as a specialist by the Court." *Id.*, at Canon 2, Committee Commentary.[10]

The history of Rule 2-105(a)(3) demonstrates that the rule was promulgated to conform with the constitutional principles expressed in this Court's commercial speech cases. Petitioner chose to hold himself out as being "certified" and a "specialist." His conduct expressly and admittedly violated the rule. *See Brief for Petitioner*, at 3-4. As discussed below, Petitioner's statement is inherently misleading and can be prohibited.

[10] Petitioner argues that Illinois attorneys are allowed to advertise that they concentrate or limit their practice and may make such statements without fulfilling any state or private criteria demonstrating special competence. *See Brief for Petitioner*, at 37. Petitioner asserts that a client will retain an attorney based upon his advertising of a certain concentration of practice, even if the lawyer has no experience in that given field. *Id.*, at 37. In so arguing, Petitioner fails to comprehend the substantive law of professional responsibility. An attorney with no experience in a specific field may not advertise that he or she practices in the area simply because the lawyer is willing to accept clients. *See, e.g., Matter of Zimmerman*, 79 A.D.2d 263, 438 N.Y.S.2d 400 (4th Dept. 1981). Such advertising would clearly be misleading and deceptive. Further, the Illinois Code mandates that lawyers always act competently and with sufficient attention to preparation and presentation. 79 Ill.2d R. Art. VIII, 6-101(a)(1) and (2) (1980).

B. Attorney Advertising Which Is False, Deceptive Or Misleading On Its Face Can Be Prohibited Without A Showing That The Advertisement Actually Misled A Member Of The Public.

This Court has defined a four-part test for determining whether state regulation violates the constitutional protection afforded commercial speech. The first part of this test holds that if the speech is inherently misleading, the other three parts of the test do not apply. In addition, if a claim on its face is inherently misleading, the state does not have to prove through direct evidence that the speech actually misled a member of the public.

The four-part test to determine whether state regulation violates the constitutional protection afforded commercial speech is set forth in *Central Hudson*, 447 U.S. 557. First, it must be determined if the speech is protected by the First Amendment. In order for commercial speech to be protected, it must at least concern lawful activity and not be misleading. *Id.* at 566. Misleading statements are defined as statements which on their face are inherently deceptive or statements where experience has proven that they in fact have misled the public. If the speech fits within either of these definitions, it can be prohibited entirely and the other three parts of the *Central Hudson* test do not apply. *See In re R.M.J.*, 455 U.S. at 203.

If the speech relates to lawful activity and is not inherently misleading, the state still maintains some authority to regulate commercial speech, but the three final parts of the *Central Hudson* test must be satisfied. *See In re R.M.J.*, 455 U.S. at 203. The final three parts of the test are that the state must be advancing a substantial governmental interest by the regulation, the regulation must directly advance the interest asserted and the

regulation may not be more extensive than is necessary to serve that interest. *Central Hudson,* 447 U.S. at 566. As argued below, Petitioner's statement is inherently misleading on its face. Therefore, the final three parts of the *Central Hudson* test should not be applied to the case at bar.

Petitioner argues that the State has not proven that his statement is inherently misleading because no member of the public has, in fact, been misled. *Brief for the Petitioner* at 21-25. The State, though, is not required to prove that any person was actually misled by Petitioner's statement. This Court has held that when the possibility of deception is self-evident, the state does not have to survey the public and produce direct evidence that the statement actually misleads the public. When a statement is facially deceptive, the state may determine on its own that a statement may be restricted because it is misleading. *See FTC v. Colgate-Palmolive Co.,* 380 U.S. 374, 391-392 (1965).[11]

[11] The Supreme Court of Illinois is the entity in the best position to determine that Petitioner's statement is misleading because the Court, exercising its inherent authority to regulate the practice of law in Illinois (*see* Sec. II (C)(1), *infra*), regularly makes determinations in attorney disciplinary cases concerning what conduct by attorneys is or is not deceptive. *See, e.g., In re Komar,* 120 Ill.2d 427 (1988). This argument is supported by *FTC v. Colgate-Palmolive Co.,* where this Court held that the FTC was in the best position to determine when a practice was deceptive under Section 5(a) of the FTC Act, 15 U.S.C. 45(a), because the FTC continually deals with cases in this area. 380 U.S. at 385. While the words "deceptive practices" under the Act set forth a legal standard and must, therefore, get their final meaning from judicial construction, the judgment of the FTC is given great weight because a decision on what is deceptive rests so heavily on inference and pragmatic judgment. *Id.* at 385. Here, this Court should depend on the reasonable inferences and pragmatic judgment of the Supreme Court of Illinois.

In the case at bar, Petitioner's statement, as argued below, is facially misleading. Therefore, the Supreme Court of Illinois can prohibit Petitioner from holding himself out as being "certified" and a "specialist" without a showing that his statement actually misled a member of the public.

C. Petitioner's Statement Is Inherently Misleading For Three Reasons: First, Petitioner's Statement Impinges Upon The Inherent Authority Of The Supreme Court Of Illinois To Regulate The Practice Of Law; Second, Petitioner's Statement Leads The Public To Believe That The State Has Sanctioned His Claim; And Third, Petitioner's Statement Contains Unverifiable Information Concerning The Quality Of Services Petitioner Believes He Provides.

The Supreme Court of Illinois found that Petitioner's statement concerning certification and specialization was misleading for three reasons. First, Petitioner's statement impinges upon the inherent authority of the Supreme Court of Illinois to regulate the practice of law in Illinois. Second, Petitioner's statement leads the public to believe that the State has sanctioned his claim. Third, Petitioner's statement concerns an unverifiable claim as to the quality of services Petitioner believes he provides. For these reasons, Petitioner's statement may be prohibited.

1. Impingement Upon Inherent Authority.

States have a compelling interest in regulating the practice of law within their boundaries. The Constitution of the State of Illinois empowers the Supreme Court of Illinois to regulate the practice of law within the State. The Supreme Court of Illinois has exercised this inherent authority in numerous cases. Petitioner's claim of certification and specialty impinge upon this inherent authority. Therefore, Petitioner's statement is inherently misleading.

This Court has held:

> We recognize that the states have a compelling interest in the practice of professions within their boundaries, and as part of their power to protect the public . . . they have broad power to establish standards for licensing practitioners and regulating the practice of professions. * * * The interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts." (Citations omitted.)

Goldfarb v. Virginia State Bar, 421 U.S. 773, 793 (1975).

Consistent with this compelling interest, the Constitution of the State of Illinois vests general administrative and supervisory authority over all Illinois courts in the Supreme Court of Illinois. This authority is exercised by the Chief Justice in accordance with Court rules. ILL. CONST. art. VI, § 16 (1970). The Supreme Court of Illinois has asserted this inherent authority in numerous decisions.

In *In re Day*, 181 Ill. 73 (1899), a case involving a legislative attempt to establish law license qualifications, the Supreme Court of Illinois held that because an attorney is an officer of the Court, the power to prescribe the qualifications for obtaining a license to practice law is vested exclusively in the Court. The legislative and executive branches of government have no authority to set qualifications. Therefore, the statute was found to be an unconstitutional infringement upon the Court's authority. *Id.* at 96-98.

In *In re Mitan*, 75 Ill.2d 118 (1979), *cert. denied*, 444 U.S. 916 (1979), a case involving attorney disciplinary procedures, the Supreme Court of Illinois held, "This court has the inherent power to regulate the admission of attorneys to the practice of law and to discipline attorneys

who have been admitted to practice before it." *Id.* at 123. The Court held that the disciplining of attorneys is in the nature of an original proceeding in the Court. *Id.* at 123. The Court ruled that technical objections to the practice and procedures of the Attorney Registration and Disciplinary Commission and its boards, cannot bind the Court or limit its authority to act. *Id.* at 124. Thus, the State Constitution and case law make clear that the Supreme Court of Illinois has the sole and inherent authority to set the qualifications to obtain and maintain a license to practice law and to discipline those attorneys who are admitted to practice.

The Illinois Court found that Petitioner's claim of certification by a private bar association "impinges upon the sole authority of this court to license attorneys in this State." *In re Peel*, 126 Ill.2d at 405; Pet. at 9a. This finding is supported by Petitioner's argument that certification by a private bar association, in effect, demonstrates that he is a better or more qualified attorney than others licensed in the State. Petitioner states that his certification is an accurate indicator of "substantial experience" and "competence". *See Brief for Petitioner*, at 22-24, 30.

A greater number of consumers of legal services will seek Petitioner's services because he holds himself out as being better qualified. An attorney who is not certified will receive less referrals because he has not taken the time or paid the expense involved in obtaining a private bar association certification. If Petitioner's claim that privately certified attorneys are better qualified is believed to be true, those attorneys who wish to represent civil litigation clients will have no choice but to be certified by a private bar association to remain competitive. The inevitable result of Petitioner's position would be the creation of a chaotic, unregulated system of civil litigation certification not sanctioned by the State.

The states have the inherent authority to regulate the practice of law within their boundaries and no one has the right to impinge upon that authority as long as the regulation at issue does not violate an individual's constitutional rights. Petitioner's claimed certification is a thinly veiled attempt to invade the province of the Supreme Court of Illinois to set the qualifications for the practice of law.[12] The Supreme Court of Illinois has the duty to protect the public from misleading claims. Therefore, the State is not violating Petitioner's constitutional rights by prohibiting his statement.[13]

[12] There is little doubt that it is the prerogative of a court, federal or state, to adopt rules regarding certification of lawyers after licensing. For example, the United States District Court for the Northern District of Illinois adopted requirements creating a trial bar to improve advocacy. This was an exercise of the inherent rule making authority of the Court. *See Brown v. McGarr*, 774 F.2d 777 (7th Cir. 1985). The rules were adopted by that federal district court in response to Devitt Committee findings regarding the general competency of federal trial lawyers. *Id.* at 778, 780-781. It was within the discretionary authority of the Court, however, and not through the whim of any private organization or association, which resulted in the creation of a certification system in that particular district. To protect society, the state *may* require a licensed professional to satisfy additional conditions after the license is granted. *Dent v. West Virginia*, 129 U.S. 114, 123 (1889) (physician's license) (emphasis supplied). Yet, only the sovereign may sanction such a requirement.

[13] Petitioner relies heavily on the fact that the States of Minnesota and Alabama both determined that an attorney who held himself out as a certified specialist by the NBTA was not engaging in misleading conduct. *See In re Johnson*, 341 N.W.2d 282 (Minn. 1983); *Ex Parte Howell*, 487 So.2d 848 (Ala. 1986). Based upon those decisions, Petitioner argues that his statement is not misleading and should not be subjected to a blanket prohibition. *See Brief for Petitioner*, at 25. Petitioner's argument is in error. First, the record in each case was significantly different from the record in this case. *See* Response, at 21-25. Second, the Supreme Courts of Minnesota and Alabama both have the inherent authority

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2. State Imprimatur.

As to the second reason, state sanction, the Supreme Court of Illinois found:

> [T]he claim of certification by the NBTA . . . is misleading because of the similarity between the words "licensed" and "certified". Webster's dictionary defines "certificate" as "a document containing a certified and usually official statement * * * especially: a document issued by * * * a state agency * * * certifying that one has satisfactorily * * * attained professional standing in a given field *and may officially practice or hold a position in that field.*" (Emphasis added.) (*Webster's Third New International Dictionary*, 366 (1986)). A "license" is defined by Webster's as "a right or permission granted * * * by a competent authority to engage in a business or occupation * * * or to engage in some transaction which *but for such license would be unlawful.*" (Emphasis added.) (*Webster's Third New International Dictionary*, 1304 (1986)). Indeed, it is apparent from the foregoing that the general public could be misled to believe that [Petitioner] may practice in the field of trial advocacy solely because he is certified by the NBTA. In [Petitioner's] letterhead, which we have set out above, directly below the statement concerning certification is the following: "Licensed: Illinois, Missouri, Arizona." The letterhead contains no indication that the licensure was by official organizations which had authority to license, whereas the certification was

[13] *continued*

to regulate the practice of law within their boundaries and to set rules of practice for attorneys who are admitted in their jurisdictions. It is the prerogative of these Courts to allow attorneys to hold themselves out as being certified by the NBTA. It is the prerogative of the Supreme Court of Illinois not to allow such statements. *See* Sec. (C)(1), n.12, *supra*.

> by an unofficial group and was purely a voluntary matter.

In re Peel, 126 Ill.2d at 405-406; Pet. at 9a.

The Supreme Court of Illinois has the inherent authority to regulate all facets of the practice of law in Illinois. Petitioner's statement would mislead the public into believing that the State has placed its imprimatur on Petitioner's claimed certified specialty. This is especially true, as the Court noted, because Petitioner places his claim in close proximity to official licensures on his letterhead. Because the letterhead makes no distinction between claims which are official and claims which indicate a purely voluntary association with a private bar group, Petitioner's statement is misleading.[14]

The State has specifically determined that speech is not protected because it is misleading. *See* 79 Ill.2d R. Art. VIII, 2-101(b) (1980). The State may, therefore, discipline Petitioner. The State's decision is supported by *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). In *Zauderer*, this Court reviewed an attorney's advertisement in which he sought contingent fee clients by advertising, "If there is no recovery, no legal fees are owed by our clients." *Id.* at 631. The Court found that the State could require the attorney to publish a disclaimer with the advertisement stating that the client would be liable for the costs of the action, whether successful or

[14] The operative word in the definition of certificate, which makes it synonymous with license, is "officially". A license is granted by an entity empowered with the authority to lawfully regulate the endeavor. A certificate or certification signifies that the holder may officially practice or hold a position in that field. When the entity empowered with the authority to regulate the endeavor sanctions the activity, it is official.

not. *Id.* at 652. The Court found that because the advertisement made no mention of the difference between legal fees and costs, the advertisement would mislead the public into believing that hiring the attorney would be financially risk-free. This Court held:

> The assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is commonplace that members of the public are often unaware of the technical meanings of such terms as 'fees' and 'costs'—terms that in ordinary usage, might well be interchangeable.

Id. at 652.

The Supreme Court of Illinois reasonably determined that the public would be misled because the public would not know the difference between the technical terms "licensed" and "certified". The public, when reading Petitioner's statement, is unaware that there is no official certification authority in the jurisdiction in which Petitioner is licensed. In fact, because the words "licensed" and "certified" are synonymous, the public is led to believe that Petitioner was officially certified and the State had placed its imprimatur upon Plaintiff's claim. As there is no dispute that this is not the case, Petitioner's statement is inherently misleading.[15]

[15] The contention that the public would be confused because they would not know the difference between the technical terms "licensed", "certified" and "specialist" is supported by a Report of the American Bar Association Standing Committee on Ethics and Professional Responsibility which was recently adopted by the House of Delegates and cited by the Illinois Court in its decision. *See, In re Peel*, 126 Ill.2d at 409-410; Pet. at 12a-14a. The Report found that the term "specialist" had acquired a secondary meaning. Members of the public believe that when a professional holds himself out as a specialist, he officially received the right to do so by some governmental agency empowered to make that designa-

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3. Claim Of Quality.

As to the third reason Petitioner's statement is inherently misleading, the Supreme Court of Illinois found that Petitioner's claim related to the quality of the services which he believes he provides. The Court found:

> [T]he claim that [Petitioner] is certified as a civil trial specialist by the NBTA is misleading because it tacitly attests to the qualifications of [Petitioner] as a civil trial advocate. Because not all attorneys licensed to practice law in Illinois are certified by the NBTA, the assertion is tantamount to a claim of superiority by those attorneys who are certified.

In re Peel, 126 Ill.2d at 406; Pet. at 9a.

This Court in the *Bates* decision held:

> [B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services—a matter which we do not address today—are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction. (Citations omitted.)

433 U.S. at 384.

Petitioner's statement concerns the quality of services he believes he provides. Statements relating to the quality of legal services are difficult, if not impossible, to verify

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[15] *continued*
tion. As the facts in the case at bar illustrate, not all specialists, and the argument can be expanded to include those individuals holding themselves out as being certified, have in fact had governmental imprimatur placed upon their claim. This supports the State's claim that Petitioner's statement is misleading.

or measure by objective standards. 79 Ill.2d R. Art. VIII, Canon 2, Committee Commentary (1980). Petitioner argues that his claim is easily verifiable and contains completely accurate factual information, unlike other claims of quality. Therefore, Petitioner argues his statement as to quality is not misleading. *Brief for Petitioner* at 22-25.

The fact that certification by the NBTA is readily verifiable is not so clear from the record. In fact, the record is clear that there is substantial confusion as to what the exact requirements are for being certified by the organization. Indeed, the Supreme Court of Illinois found that Counsel supporting Petitioner's position during the state court proceeding could not agree on the qualifications. *Peel*, 126 Ill.2d at 406-407; Pet. at 10-11a.[16] If counsel

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[16] The Supreme Court of Illinois found that each advocate representing Petitioner's interests articulated a different set of qualifications for being certified by the NBTA. Petitioner stated, "[A]n attorney must have * * * acted as lead counsel in at least 40 jury trials carried to verdict, or 100 non-jury matters tried to conclusion, successfully score on a six-hour written examination, maintain continuing participation in continuing legal education, and obtained other standards and achievements." *In re Peel*, 126 Ill.2d at 406-407; Pet. at 10a-11a. The Association of Trial Lawyers of America, in an *amicus* brief, stated the primary requirements for certification "are that the attorney have at least five years experience in civil practice, including experience as lead counsel in at least 15 major cases tried to verdict." *Id.* The NBTA, who also filed an *amicus* brief, stated that an attorney must:

> [Appear] as lead counsel in not less than 15 complete trials of civil matters to verdict or judgment, including not less than 45 days of full trial; at least five of these trials must be to a jury. In addition, applicants must have appeared as lead counsel in at least forty additional contested matters involving the taking of testimony. These may include trials, evidentiary hearings, depositions, or motions heard before or after trial.

Id.

(Footnote continued on following page)

representing Petitioner's interests could not define the qualifications for the very organization whose *bona fides* they claim are without question, it is impossible for the public to verify the meaning or usefulness of a certification by a private bar association.[17]

Petitioner's statement is commercial speech which he places on his letterhead to attract referral of clients and to impress upon the reader the quality of services Petitioner believes he provides. Petitioner's statement is an unverifiable claim concerning the quality of services he provides. Therefore, the claim is inherently misleading and may be prohibited.

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[16] *continued*

In conclusion, the Court puzzled:

> Does certification mean that the attorney has tried 40, 15, or 5 jury trials to verdict? Does the requirement concerning 40 contested matters refer to 40 jury cases tried to verdict, as the [Petitioner] asserts, or simply 40 hearings on motions, depositions and non-jury trials, as the National Board of Trial Advocacy claims? If certification conveys such a varied and uncertain understanding as to its meaning to the attorneys who are in this case contending for the cause of certification, and who should be knowledgable as to its meaning, how much more confusing is the statement that an attorney is certified as a trial specialist likely to be to the general public?

Id.

[17] Questions arise concerning the difficulty of the Association's written test, the integrity of the grading system, the evaluation of qualifications and the standards by which these qualifications are set. The Bar Examination in Illinois is under the direct control of the Supreme Court of Illinois. *See* 107 Ill.2d R. 701-706 (1985). The Court will never be able to fully regulate these variables set by a private bar association.

D. The State Is Not Obligated To Require That Petitioner Include A Disclaimer With His Statement Because The Statement Is Inherently Misleading.

The state may require that a speaker include a disclaimer with the commercial speech that is potentially misleading, rather than issue a blanket prohibition. When the speech is inherently misleading, however, the speech may be subjected to a blanket prohibition. Petitioner's statement is inherently misleading. Therefore, it can be subjected to a blanket prohibition and a disclaimer, as argued by Petitioner, is not required.

When commercial speech has a potential to mislead, the speech may not be subjected to a blanket prohibition if it can be presented in a manner that is not misleading. In other words, if a disclaimer can cure the statement's potential for deception, it cannot be prohibited entirely. The state can only require that the speaker clarify or further explain his statement in a manner that vitiates the potential to mislead. If the statement is inherently misleading, the state may subject it to a blanket prohibition. *See Bates*, 433 U.S. at 375; *In re R.M.J.*, 455 U.S. at 203.[18]

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[18] Rule 2-101(b) of the Illinois Code of Professional Responsibility requires that all publicity and advertising "contain all information necessary to make the communication not misleading and shall not contain any false of misleading statement or otherwise operate to deceive." 79 Ill.2d R. Art. VIII, 2-101(b) (1980). This rule comports with the holdings in *Bates*, 433 U.S. at 375, and *In re R.M.J.*, 455 U.S. at 203. If an attorney's advertisement has the potential to mislead, he is required to include a disclaimer with his statement. If the statement is inherently misleading, he is prohibited from disseminating it. Originally, Petitioner was charged with violating the general provisions of Rule 2-101(b). *See Complaint*, par. 4(b); J.A. at 4. The Hearing Board found that Petitioner violated the specific provisions of Rule 2-105(a)(3) and en-

(Footnote continued on following page)

As argued above, Petitioner's statement is inherently misleading for three reasons.[19] Therefore, the State can subject Petitioner's statement to a blanket prohibition, rather than require a disclaimer as argued by Petitioner. *See Brief for Petitioner*, at 26-27. The State is not obligated to require that Petitioner include a disclaimer with his statement.[20]

III.

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT PROHIBIT THE APPLICATION OF A BLANKET PROHIBITION OF PETITIONER'S STATEMENT BECAUSE ATTORNEYS MAY DISSEMINATE NON-MISLEADING INFORMATION CONCERNING THE AREAS OF LAW IN WHICH THEY PRACTICE.

Petitioner may be prohibited from holding himself out as being a "Certified Civil Trial Specialist" while attorneys may state that they "limit their practice to" or "concentrate their practice in" any area or field of law in which they practice. This is permissible because the words "limit" and "concentrate" do not connote official sanction.

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[18] *continued*
gaged in conduct which was inherently misleading. *See Report of the Hearing Panel*, Pet. at 19a-20a. Petitioner's violation of Rule 2-101(b) is not before this Court.

[19] *See* Sec. II (C), *supra*.

[20] Petitioner has never indicated that he would include a disclaimer with his statement. In addition, the parties have not previously presented evidence on, argued or briefed this issue. Therefore, the record is insufficient to review this question, much as the record is insufficient to determine that Petitioner's statement is not commercial speech. *See* Sec. I (A), *supra*. Regardless, due to the inherently misleading nature of Petitioner's statement, it is extremely doubtful that a disclaimer could be created that could make the statement not misleading.

In addition, a blanket prohibition is not objectionable simply because attorneys who accept cases in the areas of admiralty, trademark and patent law can disseminate the specific statements listed in Rules 2-105(a)(1) and (2). Again, the justification for this rule is that none of the specific statements set forth in Rules 2-105(a)(1) and (2) contain the inherently misleading terms "certified" or "specialist."

A. Claims Of Concentration And Limitation Are Permissible Because They Are Not Misleading.

Petitioner argues that the provision of Rule 2-105(a)(3) allowing attorneys to state that they "concentrate their practice in" or "limit their practice to" areas of the law in which they practice violates the Equal Protection Clause of the Fourteenth Amendment. Petitioner states that the distinction between using the terms specialization/certification and the terms limitation/concentration is "utterly irrational and furthers no legitimate state interest." *Brief for Petitioner* at 37. Petitioner's argument is in error. There is a highly rational basis for the distinction drawn by the rule. This distinction promotes a substantial state interest in providing a free flow of non-misleading commercial information to potential consumers of legal services.

The words "concentrate" and "limit" have not obtained secondary meanings such as the terms "certified" or "specialist". *See* Sec. II (C)(2), n.15, *supra*. Because the words "limit" and "concentrate" do not connote impingement upon the inherent authority of the State to regulate the practice of law, imply State imprimatur or constitute an unverifiable statement of quality, the terms "concentrate"

and "limit" are not inherently misleading.[21] Therefore, the terms "concentrate" and "limit" cannot be subjected to a blanket prohibition. Use of the terms "concentrate" and "limit" also comports with the last three parts of the *Central Hudson* test.[22]

First, a substantial state interest is required. The interest in this matter is defined by the Committee Comments to the rule:

> [A] lawyer who spends a substantial portion of time working in a few areas [may] identify those areas so that the public can have the benefit of that information. Obviously, identification of lawyers who work in a particular area in which the client is interested is useful information which should be disseminated. Statements that a lawyer's practice is "limited" to certain areas or that the practice is "concentrated" in those areas provide important information to the public without implying that the lawyer is licensed as a specialist by the court.

79 Ill.2d R. Art. VIII, Canon 2, Committee Commentary (1980).

Providing non-misleading information to consumers interested in obtaining a lawyer who practices in a certain area of the law, is clearly and directly advanced by the concentration and limitation provision of Rule 2-105(a)(3). In addition, the regulation is narrowly tailored to serve the State's interest.[23] Therefore, the certification and limitation provision of Rule 2-105(a)(3) does not violate Petitioner's right to Equal Protection pursuant to the Fourteenth Amendment.

B. Claims Concerning Limitation Of Practice In Admiralty, Trademark And Patent Law Are Permissible Because They Are Not Misleading.

Rules 2-105(a)(1) and (2) allow attorneys who practice in the areas of admiralty trademark and patent law to indicate that they will accept cases in such fields by disseminating certain carefully worded phrases.[24] None of

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[21] The terms "concentrate" and "limit" do not impinge upon the inherent authority of the state to regulate the practice of law because they are not an attempt by the speaker to set a qualification for the practice of law in Illinois. *See* Sec. II (C)(1), *supra*. Instead, the terms simply indicate that the speaker has decided to concentrate or limit his practice in a certain substantive area of the law. The terms do not imply State sanction. *See* Sec. II (C)(2), *supra*. Finally, the terms do not constitute an unverifiable statement of quality by the speaker. While a reader may infer from a statement concerning concentration or limitation that the speaker provides better quality services, whether an attorney concentrates or limits his practice to a certain area is a factual question which is easily verifiable. *See Matter of Zimmerman*, 79 A.D.2d 263, 438 N.Y.S.2d 400 (discussed in detail in Sec. II (A), n.10, *supra*). In other words, claims of concentration and limitation can be readily determined. *See* Sec. II (C)(3), *supra*.

[22] *See* Sec. II (B), *supra*. The final three parts of the *Central Hudson* test are that the state must be advancing a substantial state interest by the regulation, the regulation must directly advance the interests asserted and the regulation may not be more extensive than necessary to serve that interest. 447 U.S. at 566.

[23] *See Board of Trustees of the State University of New York v. Fox*, wherein this Court held that the narrowly tailored test set forth in *Central Hudson*, *supra*, does not mean that the least severe regulation that will achieve the desired end is required. Rather, only a reasonable fit between the government's interest and the means chosen to service that interest is required. 109 S. Ct. at 3035. It is clear that the regulation at hand is a reasonable fit between the asserted interest and the means chosen by the State to service that interest.

[24] Attorneys who are admitted to practice before the United States Patent and Trademark office may use the designations "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney" or any combination of these terms on his, let-

(Footnote continued on following page)

these phrases contain the inherently misleading terms "certified" or "specialist". *See* Sec. II (C), *supra*.

The substantial state interest furthered by these regulations and the justification for these rules are the same as asserted for claims of concentration and limitation. *See* Sec. III (A), *supra*. In addition, the state court found that the specific distinctions set forth in Rules 2-105(a)(1) and (2) were justified because the public has historically had difficulty finding attorneys who practice in the areas of admiralty, trademark and patent, while locating an attorney who is a civil trial advocate does not involve the same difficulty. *In re Peel*, 126 Ill.2d at 410-411; Pet. at 14a (citing *Silverman v. State Bar*, 405 F.2d 410 (5th Cir. 1968), which supports the position that attorneys practicing in admiralty, trademark and patent have always been difficult for the public to locate).

The regulations contained in Rules 2-105(a)(1) and (2) were promulgated with a substantial state interest as their basis. The rules themselves directly advance this interest and are closely tailored and narrowly drawn. Therefore, the specific provisions in Rules 2-105(a)(1) and (2) do not violate Petitioner's right to Equal Protection pursuant to the Fourteenth Amendment.

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[24] *continued*

terhead and office sign. 79 Ill.2d R. Art. VIII, 2-105(a)(1) (1980). A lawyer engaged in the trademark practice may use the designations "Trademark," "Trademark Attorney" or "Trademark Lawyer," or any combination of these terms in any form of permissible advertising. 79 Ill.2d R. Art. VIII, 2-105(a)(2) (1980). A lawyer engaged in the admiraltry practice may use the designations "Admiralty," "Practice in Admiralty" or "Admiralty Lawyer," or any combination of these terms in any form of permissible advertising. *Id.* These claims are not misleading and are easily verifiable. *See Matter of Zimmerman*, 79 A.D.2d 263, 438 N.Y.S.2d 400 (4th Dept. 1981) (discussed in detail in Sec. II (A), n.10, *supra*).

CONCLUSION

For the foregoing reasons, the judgment and order of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

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October 5, 1989

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No. 88-1775

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GARY E. PEEL,

Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF

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On Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF

At issue in this case is the constitutionality of a decision by the State of Illinois to censure petitioner for placing on his letterhead the truthful statement that he is certified as a civil trial specialist by the National Board of Trial Advocacy ("NBTA"). Petitioner and numerous *amici*, including the Federal Trade Commission, have demonstrated that petitioner's statement about NBTA certification is worthy of First Amendment protection because it helps potential clients overcome "informational shortcomings that obscure differences in the experience, knowledge and skills" of attorneys.[1] It also furthers

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[1] Brief Amicus Curiae for the Federal Trade Commission at 19.

Petitioner also contends that the application of Disciplinary Rule 2-105(a)(3) ("D.R. 2-105") violates the Equal Protection Clause of the Fourteenth Amendment.

weighty public interests in access to the courts, the sound administration of justice, and vindication of important rights. Without contesting that this expression is valuable, respondent nonetheless contends that it is wholly outside the protection of the First Amendment and can therefore be banned. This argument cannot withstand scrutiny.

I. RESPONDENT HAS EFFECTIVELY CONCEDED THAT UNLESS PETITIONER'S TRUTHFUL STATEMENT THAT HE HAS BEEN CERTIFIED BY NBTA IS "NECESSARILY" AND "INEVITABLY" MISLEADING, A BLANKET PROHIBITION OF THAT STATEMENT VIOLATES THE FIRST AMENDMENT. THE STATEMENT ABOUT NBTA CERTIFICATION ON PETITIONER'S LETTERHEAD CANNOT PLAUSIBLY BE HELD TO BE NECESSARILY AND INEVITABLY MISLEADING.

Respondent does not even argue that D.R. 2-105 is narrowly tailored to further a substantial state interest,[2] and no such argument would be possible. The judgment of the Illinois Supreme Court censuring petitioner thus survives scrutiny only if respondent has carried its burden of proving that statements about attorney certification are so "necessarily" and "inevitably" misleading that they fall entirely outside the protection of the First Amendment. *See In re R.M.J.*, 455 U.S. 191, 202 (1982); *Bates v. State Bar of Arizona*, 433 U.S. 350, 372 (1977). That burden has not been met.

Respondent offers three arguments for finding all attorney statements about certification necessarily and inevitably misleading: (1) they "impinge[] upon the inherent authority of the Supreme Court of Illinois to regulate the practice of law"; (2) they imply that the state "has sanctioned" the certification; and (3) they "contain[] information concerning the quality" of legal services. *See* Brief for Respondent at 16.

[2] *See* Brief for Respondent at 15-34. Because petitioner's statement about NBTA certification is not "commercial" speech, *see* Point II *infra*, respondent could not prevail even if it had shown that D.R. 2-105 meets this test for regulation of commercial speech.

Impingement of state authority. Respondent's argument that certification by NBTA impinges state authority is without merit. NBTA certification does not impinge upon the authority of the Illinois Supreme Court to set requirements for admission to practice, or to establish disciplinary regulations for the profession. NBTA certification is entirely voluntary. It does not authorize certified lawyers to practice in any court in which noncertified lawyers may not appear, or to perform any task that noncertified lawyers may not perform. Furthermore, in States where state supreme courts have established their own specialty certification programs, lawyers must first be certified by those programs before they may be certified by NBTA. Brief for the National Board of Trial Advocacy as *Amicus Curiae* at 14. In any event, the inherent authority of state supreme courts to set standards for admission or discipline is limited by the Constitution. *See, e.g., Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) (requirement of state residency for bar admission violates the Privileges and Immunities Clause, Art. IV, sec. 2).[3]

[3] The Supreme Court of Illinois did not assert that "impinging the State's regulatory authority" and "implying state sanction" were separate grounds for finding statements about NBTA certification inherently misleading. The court's opinion makes clear that it considered the two to be synonymous. App. 9a. Respondent advances a somewhat different argument in positing "impinging the State's regulatory authority" as a ground separate from "falsely implying state sponsorship." Respondent contends that statements about NBTA certification impinge the State's regulatory authority because such statements substitute private for official authority in certifying specialists *and* because such statements implicitly attest to the superior qualifications of certified attorneys. Brief for Re-

State Sanction. Respondent's argument that statements about certification by the *National* Board of Trial Advocacy will "necessarily" and "inevitably" mislead potential clients into believeing the *State* of Illinois endorses that certification is certainly not self-evident. Indeed, *amicus* Federal Trade Commission—the Nation's repository of expertise on misleading and deceptive trade practices—has concluded that respondent's argument is "implausible" because "it is highly unlikely that an attorney's truthful representation that he has been certified by the *National* Board of Trial Advocacy would mislead the public to believe his certification constituted some kind of state license to practice law." Brief for the Federal Trade Commission as *Amicus Curiae* at 25 n.23, and 22 (emphasis in original). Similarly, both of the other state supreme courts that have considered this issue found that statements about NBTA certification were not even potentially—much less inherently—misleading in this way.[4]

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spondent at 24-25. These contentions simply restate the other justifications respondent has offered for D.R. 2-105's blanket prohibition.

Respondent's claim that "the inevitable result of petitioner's position would be the creation of a chaotic, unregulated system of civil litigation certification not sanctioned by the State," Brief for Respondent at 25, is unfounded speculation. Respondent advances no empirical support fo· this unlikely scenario. More importantly, this is not an argument that statements about NBTA certification are misleading. It is an argument about the consequences of permitting claims about certification by private organizations—misleading or not. For this reason, the argument cannot justify a blanket prohibition of statements about NBTA certification on the ground that such statements are necessarily and inevitably misleading. Respondent has not tried to justify D.R. 2-105's blanket prohibition as a narrowly tailored means reasonably necessary to vindicate this purported interest in staving off chaos. Such an argument would be unavailing. Even in the unlikely event that respondent could make a plausible case for the asserted risk, a plethora of less restrictive options—including the regulatory approaches adopted in Minnesota and Alabama—could easily remedy this purported harm. *See* Brief for Petitioner at 26-29.

[4] *See Ex Parte Howell*, 487 So.2d 848 (Ala. 1986); *In re Johnson*, 241 N.W.2d 282 (Minn. 1983).

Respondent has offered *no* empirical evidence to support its dubious *ipse dixit* argument.[5]

Nor has respondent even attempted to reconcile this argument with its own refusal in this case to find petitioner's letterhead statement misleading under D.R. 2-101 (b), which prohibits any public communication that fails to contain "all information necessary to make the communication not misleading."[6] If petitioner's statement really was "inevitably" and "necessarily" misleading, his statement would also have violated that rule. Respondent cannot plausibly argue that petitioner's statement is inevitably misleading when respondent has itself concluded

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[5] Aside from a highly selective and misleading quotation from *Webster's Third New International Dictionary, see* Brief for the Federal Trade Commission as *Amicus Curiae* at 22-23 (setting forth full definition), the only source cited for respondent's position is a draft report of the American Bar Association's Standing Committee on Ethics and Professional Responsibility, which stated that a claim of specialty by an attorney has "acquired a secondary meaning implying formal recognition as a specialist." App. 13a. This report cannot, however, bear the weight respondent places on it. First, the report identifies a risk that the public may be misled by a claim of specialization to believe that the specialist has been "formally" recognized when in fact he or she has not. In the present case, of course, petitioner *has* been "formally" recognized by a bona fide organization, NBTA. Even with respect to claims of specialization, the report does not state that potential clients will be misled into thinking that the "formal" recognition is by the State, rather than by a private credentialling organization. Second, the report identifies *no* empirical support for its conclusions, and petitioner is aware of no such evidence. Third, the report does not contend that statements concerning specialization would be misleading in states "which provide procedures for certification on recognition of specialization." App. 13a. Thus, the report does not contend, as does respondent, that statements concerning specialization are "necessarily" and "inevitably" misleading.

[6] Petitioner was specifically charged with violation of this provision; indeed the ARDC Administrator argued that it was the most serious charged levelled against petitioner. App. 34a-35a.

that the statement did not violate D.R. 2-101—the rule specifically designed to prohibit misleading statements.[7]

Finally, respondent's argument completely ignores the test established by this Court, under which expression cannot be classified "inevitably" and "necessarily" misleading if it could be communicated in a nonmisleading manner. *See In re R.M.J.*, 455 U.S. 191, 203 (1982) (prohibition not permitted "if the information may also be presented in a way that is not deceptive"). Because the finding of the Illinois Supreme Court that petitioner's letterhead statement about NBTA certification was misleading rested largely on the proximity of that statement to statements about state licensure, a simple requirement that such statements be separated on letterhead would fully address the purported harm.[8]

Attorney Qualifications. Respondent has not even attempted to demonstrate that attorney statements about *NBTA certification* inevitably mislead potential clients about the experience and qualifications of those attorneys. Instead, respondent seeks refuge in the argument that, in

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[7] In contrast, D.R. 2-105 was designed to prohibit *all* statements concerning certification or specialization, whether misleading or not. The test of that rule does not require any showing that the statement is misleading. *See* Petition at 7-8; Brief for Petitioner at 28.

[8] A disclaimer requirement, mandating the addition of specific language that Illinois does not require or endorse NBTA certification, might be an excessive burden on petitioner's expression. A state procedure for recognizing certifying organizations would fully satisfy the state's interest without requiring each individual statement to be accompanied by a disclaimer. See generally Brief *Amicus Curiae* of the American Advertising Federation, Inc., at 7 n.2, arguing that in some circumstances an unduly burdensome disclosure requirement could itself violate the First Amendment, a question left open in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 653 n.15 (1985).

That a State could avoid the risk it posits simply by requiring a disclaimer, however, illustrates that statements about certification are not inherently misleading.

general, factual statements implying anything about the quality of the professional services of an attorney are inherently misleading. As demonstrated, that argument is facially implausible. *See* Brief for Petitioner at 20-23. More importantly, the reasoning underlying that argument has been squarely rejected by this Court. The First Amendment does "not permit a State to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 640 n.9 (1985). Petitioner's letterhead statement about NBTA certification as a civil trial specialist is an accurate and readily verifiable statement of fact regarding the nature of his practice. Accordingly, even if petitioner's statement is properly classified as commercial speech, it is precisely the type of expression this Court held the First Amendment protects in *Zauderer* and *In re R.M.J.*

II. PETITIONER'S STATEMENT ABOUT NBTA CERTIFICATION WAS NOT COMMERCIAL SPEECH.

Because petitioner's statement is protected even if it is "commercial" speech, the Court need not reach the broader issue whether petitioner's statement is properly classified as commercial speech. *Cf. Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). The broader issue is, however, properly before the Court because it was raised and decided in the Supreme Court of Illinois. If this Court reaches the issue, petitioner's letterhead statement should be found fully protected because the statement does not itself propose a commercial transaction and was not made in the context of soliciting legal business or otherwise proposing a commercial transaction.

A. The Issue Whether Petitioner's Statement Is Commercial Speech Is Properly Before The Court.

The Supreme Court of Illinois necessarily decided that petitioner's letterhead statement was "commercial speech," and therefore could be banned pursuant to D.R. 2-105.[9] Even respondent concedes that the judgment below rests on the "implicit determination that Petitioner's statement is commercial speech." Brief for Respondent at 6, n.1. Thus no jurisdictional bar precludes this Court from considering whether petitioner's letterhead statement can properly be classified as commercial speech. *See New Jersey v. Portash*, 440 U.S. 450, 455 (1979).[10] Nor do any prudential considerations counsel against resolution of this issue. Petitioner never conceded that his letterhead was commercial speech. To the contrary, at every stage in the state proceedings he pressed the broader First Amendment argument.

Petitioner's motion to dismiss the ARDC proceedings claimed that application of D.R. 2-105 violated his right to "free speech, including commercial speech." At the ARDC hearing, petitioner specifically testified that he did not use the letterhead statement about NBTA certification as part of any direct effort to solicit new clients, that he had never used the statement in the yellow pages or brochures, and that he had never used the letterhead as part of any direct mail efforts. Hearing Transcript at 21-30; App. 25a-30a.[11]

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[9] *See* Brief for the Federal Trade Commission as *Amicus Curiae* at 10 ("the state court *necessarily* decided . . . that the appropriate standard of review was that applied in assessing regulations of commercial speech, as opposed to noncommercial speech") (emphasis added).

[10] *See also Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971).

[11] Respondent's claim that petitioner "did not present evidence tending to show that his statement was not commercial speech," *see* Brief for Respondent at 8 n.1, simply ignores this uncontroverted testimony.

Nor did petitioner limit himself to commercial speech arguments before the Supreme Court of Illinois. The question he presented for review was "[w]hether the First Amendment to the United States Constitution prohibits a blanket prohibition on an attorney's office stationary designation which states the attorney is a 'Certified Civil Trial Specialist by the National Board of Trial Advocacy' when that designation is true." *Brief and Argument of Respondent* (Peel) in the Illinois Supreme Court at 3. His brief specifically argued that the expression at issue could not be banned because it was not part of an effort to solicit business:

> there is a *grave difference* between placing the designation on the letterhead, which reaches generally only other lawyers, *present* clients, and others with whom the lawyer already conducts business, and the mailing of announcements indiscriminately or placing an ad in the telephone directory. In the latter . . . the sole purpose is to invite a relationship with a member of the general public . . . . [T]he state may have a more significant interest in protecting those intended recipients who may find the factor of certification designation important to their decision on which lawyer to choose, *but that justification is completely absent in Mr. Peel's case.*

Id. at 13 (emphasis added). Thus, petitioner squarely argued that the justification which permits States to regulate commercial speech by attorneys—*i.e.*, solicitation of business—was "completely absent" in his case.[12] Any prudential requirement that issues be raised, as well as decided, in the state proceedings has therefore been satisfied. *Cf. McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

In any event, the issue whether petitioner's statement about NBTA certification can be classified as commercial

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[12] This is the argument petitioner raised in Question II of the Petition, and the Court has granted review of that question.

speech is—at a minimum—a mere "enlargement" of the issue whether application of D.R. 2-105 to that statement violates the commercial speech principles elaborated by this Court. *See Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972); *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899); *cf. Illinois v. Gates*, 462 U.S. 213, 246-253 (1983) (White, J., concurring in the judgment). The proper classification of petitioner's statement is "so connected . . . in substance" with whether the statement was properly banned "as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment." *Dewey v. Des Moines*, 173 U.S. at 197-198. Under these circumstances, this Court should have "no hesitation" to address the issue of how petitioner's statement should be classified for First Amendment purposes. *Id.*[13]

Stanley v. Illinois makes clear that the Court can and should decide this issue. In *Stanley*, the Court set forth two conditions that permitted resolution of a particular equal protection challenge to state procedures, despite the petitioner's failure to raise that challenge in the state court: (i) the case was decided on the "constitutional premise raised below"; and (ii) the result was reached "by a method of analysis readily available to the state court." 405 U.S. at 658 n.10. These conditions are fully met here. The same "constitutional premise" is involved in both questions—that the First Amendment prohibits Illinois from censuring petitioner for placing on his letterhead an accurate statement about NBTA certification. And the method of analysis was readily available to the Supreme Court of Illinois. Petitioner pressed the argument that the First Amendment barred application of D.R. 2-105 precisely because petitioner's letterhead was not used in the context of soliciting business.

[13] Even if petitioner had characterized his letterhead statement as purely commercial speech, that characterization "clearly does not bind this Court in this new and evolving area of constitutional law." *Central Hudson Gas and Elec. v. Public Service Comm'n of New York*, 447 U.S. 557, 581 n.4 (1980) (Stevens, J., concurring).

Accordingly, no jurisdictional or prudential consideration precludes the Court from deciding the proper First Amendment classification of petitioner's letterhead statement.

B. Petitioner's Statement About NBTA Certification Is Not Commercial Speech.

The Court's recent decision in *Board of Trustees of the State University of New York v. Fox* explicitly "defines" commercial speech as "speech that proposes a commercial transaction." 109 S. Ct. 3028, 3036 (1989). Contrary to respondent's suggestion, petitioner does not contend that this definition should be applied woodenly to encompass only words that explicitly propose a commercial transaction. Petitioner has consistently acknowledged that expression can be classified as commercial speech if it either explicitly proposes a commercial transaction, or is made in the context of proposing a commercial transaction.[14] "[B]y definition, commercial speech is linked inextricably to commercial activity." *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979). This link provides the justification for permitting the States greater latitude to regulate. The commercial context both creates the incentive for misleading consumers and provides a financial motive diminishing the likelihood that valuable expression will be chilled. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976); *cf. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (plurality opinion).

Petitioner's statement cannot be deemed to be made in the context of proposing a commercial transaction simply because it appears in his letterhead. Many organizations that provide legal services but do not charge fees, such as the ACLU Foundation or the Washington Legal Foundation, routinely communicate with the public using their

[14] Brief for Petitioner at 34; *See* Petition for Certiorari at 14-15.

letterheads. Inclusion of statements about certification in the letterheads of such organizations would in no sense be commercial speech. Respondent's argument on this point rests on a faulty analogy between letterhead and trade names of the type at issue in *Friedman v. Rogers*. A trade name can be regulated in all its uses because "[i]n each role, the trade name is used as part of a proposal of a commercial transaction." 440 U.S. at 11. Invariably, the Court found, use of a trade name involves "mere solicitation of patronage." 440 U.S. at 11 n.10. That link to solicitation is not invariably present with respect to attorney letterhead. Any such linkage depends on the context in which the letterhead is used.

Nor can petitioner's statement be classified as commercial speech merely because he ordinarily seeks remuneration for his legal services. *See Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Thornhill v. Alabama*, 310 U.S. 88 (1940). Much expression by attorneys—including articles in law reviews and speeches to bar associations or civic groups—may enhance professional status or business opportunities by demonstrating special knowledge or competence. Yet that expression is not "linked inextricably to commercial activity," and cannot be classified as commercial speech. *Friedman v. Rogers*, 440 U.S. at 10 n.9. The commercial benefits accruing to an attorney from such fully protected expression are merely incidental.

Nor can the use of letterhead by a private practitioner, without more, be deemed commercial speech. Any assumption of a predominantly commercial purpose is untenable where—as in this case—the letterhead statement merely accompanies communications to government authorities or to professional peers. In such circumstances a letterhead statement about NBTA certification could well be intended to convey, and be reasonably understood to convey, any number of messages unrelated to commercial activity. For example, such a statement could be intended

to convey a sense of pride in the accomplishment that NBTA certification connotes, or a personal endorsement of the certification process and the valuable goals NBTA certification furthers. It might be intended to encourage other attorneys to fulfill the requirements necessary for certification, or to educate readers about the fact of NBTA as a certifying organization. It could be intended to convey a professional interest in, and commitment to, improvement of the quality of advocacy through the certification process. Or—when used by a prominant local practitioner such as petitioner—the inclusion of a statement about NBTA certification could be intended to legitimate the certification process as a proper activity for leaders of the profession.

Although no simple litmus test defines when attorney expression may be regulated as commercial speech, the concept of "solicitation"—as understood in the context of the ethical constraints on lawyers—provides a touchstone for deciding when expression by an attorney is primarily for the purpose of proposing a commercial transaction and may therefore be classified as commercial speech. *Cf. Friedman v. Rogers*, 440 U.S. at 11 n.10 (trade name involves "mere solicitation of patronage"). Statements made in the context of solicitation of potential clients would ordinarily be considered "commercial" speech. Under this standard, expression contained in a letterhead could be regulated as commercial speech if the expression occurs in the context of solicitation.

As demonstrated, the record in this case does not support an inference that the letterhead was used, either explicitly or implicitly, in the context of proposing a commercial transaction or relationship. *See* Brief for Petitioner at 33-37. Respondent has made no showing that any commercial benefit accrued to petitioner as a result of his letterhead statement about NBTA certification. Any such benefit would have been wholly incidental to the other purposes animating his communications with the ARDC and his professional peers. Accordingly, his state-

ment was entitled to the full protection of the First Amendment.[15]

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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November 2, 1989

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[15]At a minimum, petitioner's letterhead statement should be found to be fully protected because its predominant purpose was not commercial. This Court has made clear that when expression combines commercial and noncommercial elements, the proper First Amendment classification of the expression depends on its predominant purpose. *Riley v. National Federation of the Blind of North Carolina*, 108 S. Ct. 2667 (1988); *Bolger*, 463 U.S. at 62-64.

Even if petitioner's statement was commercial speech, D.R. 2-105 should still be invalidated in this case on grounds of substantial overbreadth. The literal terms of D.R. 2-105 preclude an attorney from making any public statement that he or she is certified—irrespective of the context. As the discussion in text makes clear, this regulation prohibits a substantial amount of fully protected expression. *See Fox*, 109 S. Ct. at 3038-3039; *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

(5)

No. 88-1775

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GARY E. PEEL,
Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,
Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN ADVERTISING FEDERATION, INC. IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36 of the Rules of this Court, *amicus*, The American Advertising Federation ("AAF"), hereby moves for leave to file the accompanying brief *amicus curiae*. Petitioner has granted but respondent has refused consent for AAF to file a brief *amicus curiae* in this case.

The American Advertising Federation is a national trade association that comprises all elements of the advertising industry. Its membership includes 190 companies with numerous subsidiaries that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, radio and television networks, outdoor advertising organizations, and other media.

The membership of AAF consists of individuals and companies possessing an expertise in commercial com-

munication. Each has a direct and continuing interest in maintaining channels of speech unimpeded by governmental abridgments which would affect the right of producers of goods and services to provide, and the public to receive, information regarding those goods and services. AAF contends that the blanket prohibition imposed by the Illinois Supreme Court on a lawyer's truthful representation that he is a certified specialist violates the First Amendment standards established by this Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980), and other cases including, most recently, *Board of Trustees of the State University of New York* v. *Fox*, 57 U.S.L.W. 5015 (1989).

In the past, AAF has filed briefs *amicus curiae* in a number of cases before this Court. These cases include *Board of Trustees of the State University of New York* v. *Fox*, *ibid.*; *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986); and *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984).

Because of its special expertise in commercial communication and the direct and substantial interest of its members in the resolution of the case at bar, AAF requests leave to brief this issue as *amicus curiae*.

Respectfully submitted,

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August 31, 1989

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On Writ of Certiorari to the Supreme Court of Illinois

BRIEF AMICUS CURIAE OF THE AMERICAN ADVERTISING FEDERATION, INC. IN SUPPORT OF THE PETITIONER

INTEREST OF AMICUS CURIAE

The American Advertising Federation, Inc. ("AAF") is a national trade association that comprises all elements of the advertising industry. Its membership includes 190 companies with numerous subsidiaries that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, radio and television networks, outdoor advertising organizations, and other media. Twenty-one national

trade associations and 226 local advertising clubs/federations with 39,700 members engaged in advertising pursuits also are members of AAF. One hundred sixty-five college chapters, composed of 5,000 students, are members of AAF.

The membership of AAF consists of individuals and companies possessing an expertise in commercial communication. Each has a direct and continuing interest in maintaining channels of speech unimpeded by governmental abridgments which would affect the right of producers of goods and services to provide—and the public to receive—information regarding those goods and services. AAF contends that the blanket prohibition imposed by the Illinois Supreme Court on a lawyer's truthful representation that he is a certified specialist violates the First Amendment standards established by this Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980), and other cases including, most recently, *Board of Trustees of the State University of New York* v. *Fox*, 57 U.S.L.W. 5015 (1989).

SUMMARY OF ARGUMENT

The Illinois Supreme Court's decision in this case rests on two erroneous premises which cannot be permitted to stand. The first is that the notation on petitioner's letterhead can be regulated as "commercial speech." The second is that "commercial speech" is a suspect form of expression that, for all practical purposes, falls outside the protection of the First Amendment, subject to censorship at the government's discretion. If either of the lower court's premises is in error—and *amicus* suggests respectfully that both are—its judgment must be reversed. Even if the speech in issue were commercial speech, it still would be entitled to "substantial" First Amendment protection, *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 68 (1983), which was not afforded by the Illinois Supreme Court here.

ARGUMENT

I. STATEMENTS ON AN ATTORNEY'S LETTERHEAD CANNOT BE REGULATED AS "COMMERCIAL SPEECH"

The category of "commercial speech," as this Court often has noted, does not encompass all messages about business or professional activity. Speech receives the diminished constitutional protection afforded "commercial speech" only when, in the final analysis, it does "no more than propose a commercial transaction." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). As the Court stated just last Term in *Board of Trustees* v. *Fox*, 57 U.S.L.W. 5015, 5016 (1989), whether the expression in question proposes a commercial transaction is "the test for identifying commercial speech." See also *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U.S. 748, 771 (1976); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978); *Dun & Bradstreet, Inc.* v. *Greenmoss Bldrs., Inc.*, 472 U.S. 749, 790 (1985) (Brennan, J., dissenting).

Nothing in the factual record, and nothing of which the lower court could have taken judicial notice, permitted its implicit equation of this attorney's letterhead with the kind of advertisements or solicitations that have been at issue in the Court's lawyer-advertising cases. Compare *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977) (newspaper advertisement of clinic's services and fees); *Ohralik*, *supra* (attorney's in-person solicitation of accident victims to obtain their business); *In re R.M.J.*, 455 U.S. 191 (1982) (published advertisements listing attorney's areas of practice and bar admissions; mailings of announcement cards to potential clients); *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (newspaper advertisements soliciting clients with Dalkon Shield problems); *Shapero* v. *Kentucky Bar Ass'n*, 100 L.Ed.2d 475 (1988) (personalized mailings seeking the business of non-clients known to be facing foreclosure).

Petitioner used his letterhead in the general conduct of his law business (essentially corresponding with other attorneys and with existing clients), not ordinarily to solicit legal business. There was no evidence or finding here that the reference to petitioner's certification by the National Board of Trial Advocacy was intended to attract new clients. Petitioner's primary purpose and effect may have been to inform other lawyers (including adversaries) of his trial work—so many lawyers never see the inside of a courtroom—or simply to express pride in his recognition by a respected legal organization. The letterhead's meaningful, pertinent, and substantive description of petitioner's type of law practice is "categorically different from the mere solicitation of patronage implicit in a trade name." *Friedman* v. *Rogers*, 440 U.S. 1, 11, n. 10 (1979).

In the absence of evidence that the letterhead was directly used to propose commercial transactions, its promotional quality was far too subtle, oblique, and incidental to constitute an example of regulable commercial speech. It is common today for a law firm's letterhead to note additional jurisdictions in which its attorneys are admitted to practice, and to list the firm's multiple addresses. Like the letterhead statement here, such comments are simply factually informative, however attractive a portrait they may paint. The mere chance that speech will indirectly motivate a putative consumer to purchase the speaker's services cannot operate to deny the speech its full First Amendment protection. If it did, virtually all speech by business enterprises and their agents would be relegated to an inferior status under the Constitution. Rejecting this proposition in *Fox*, the Court noted that "[s]ome of our most valued forms of fully protected speech are uttered for a profit," and that speech is "commercial" only if it "*proposes* a commercial transaction." 57 U.S.L.W. at 5019 (emphasis in original).

Whatever medium a speaker uses to communicate his message—broadcast, print, mail, telephone—his speech is "commercial" only if it proposes a business transaction with the communication's recipient. Mere linkage of a product to a public debate does not transform the advertisement into something other than commercial speech. *Fox*, 57 U.S.L.W. at 5017; *Bolger* v. *Youngs Drug Product Corp.*, 463 U.S. 60 (1983); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563, n. 5 (1980). Conversely, the possibility that direct comments on issues of public importance, or other messages that do not directly propose a commercial transaction, nevertheless may generate business for the speaker does not diminish that speech's First Amendment protection.

II. EVEN AS COMMERCIAL SPEECH, A BAN ON THE STATEMENTS IN PETITIONER'S LETTERHEAD WOULD VIOLATE THE FIRST AMENDMENT

If the reference in petitioner's letterhead to his certification did constitute commercial speech, the Illinois Supreme Court's approval of a complete ban on that speech still would be impermissible. The lower court's decision rests on nothing more than a hunch that readers might misconstrue petitioner's undeniably accurate message. No decision of this Court can, or should, be construed to permit the banning of truthful speech on so flimsy, so entirely speculative, a basis.

It is undisputed that petitioner's claim of certification as a civil trial specialist by the National Board of Trial Advocacy is both accurate and verifiable. As a truthful statement relating to lawful activities, see *In re R.M.J.*, 455 U.S. 191, 203 (1982), petitioner's speech satisfies the first prong of the four-part test set forth in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 566 (1980), and clearly is protected. The lower court's conjecture concerning ways in which unsophisti-

cated readers could misconstrue the message surely cannot be sufficient basis to label it misleading or deceptive and thereby prohibit it entirely. At best, the lower court was *hypothesizing* ways in which the statement could *potentially* be misleading.

The Court provided no support for its view that such a low standard could justify the condemnation of commercial speech. Even if it could, under the remaining prongs of *Central Hudson*, the court could approve only such restrictions as would directly advance, and be narrowly tailored to, the State's professed interests—assuming those interests qualified as "substantial." See *R.M.J.*, 455 U.S. at 203; *Board of Trustees* v. *Fox*, 57 U.S.L.W. 5015, 5018 (1989). In the context of this case, the restraint could be "no broader than reasonably necessary to prevent the deception." *R.M.J.*, 455 U.S. at 203.

The Court in *Fox* took pains to note that the requirement of a "reasonable fit" or a "means narrowly tailored to achieve the desired objective," is a meaningful one:

> We reject the contention that the test we have described is overly permissive. It is far different, of course, from the "rational basis" test used for Fourteenth Amendment equal protection analysis. . . . There it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost. Here we require the government goal to be substantial, and the cost to be carefully calculated. Moreover, since the State bears the burden of justifying its restrictions, see *Zauderer*, *supra*, at 647, it must affirmatively establish the reasonable fit we require.

57 U.S.L.W. at 5018.

It requires little analysis to demonstrate that the State has failed to craft a restriction that survives this test. It simply has forbidden the speech, not pausing to consider the cost of its actions or whether other means were

available to avoid the perceived harm.[1] One such available remedy, of course, would be for the State to embark upon its own program for certifying attorneys as specialists in particular fields. Another would be for the State to create a reasonable mechanism for approval or disapproval of certification by independent organizations, such as the National Board of Trial Advocacy. See *Ex. Parte Howell*, 487 So. 2d 848, 851 (1986). By promulgating standards for such organizations to follow in order to receive the State's imprimatur, or simply by evaluating the standards established by such organizations, the State readily could ensure both that statements such as petitioner's would not be misleading and that such statements would have greater significance for the consuming public.[2]

The administrative ease of banning the speech outright is of no moment. We are dealing with protected speech, whatever the level of protection. As the Court stated in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985), the government may not suppress "truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising." See *Shapero* v. *Kentucky Bar Ass'n*, 100 L.Ed.2d 475, 487 (1988). The banning of

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[1] In both *R.M.J.*, 455 U.S. at 203, and *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 644 (1985), the Court held that such an absolute prohibition is unconstitutional "if the information also may be presented in a way that is not deceptive."

[2] One possible remedy that would not be narrowly tailored to the State's interests under the facts of this case would be the requirement of a disclaimer, or the presentation of additional information, about NBTA certification. Requiring an attorney to fill his letterhead with state-mandated disclosures would be no less onerous, in practice, than the lower court's requirement that he remove the information altogether. Even in the context of a published adverisement, a required disclaimer or disclosure that unduly interfered with the presentation of the speaker's truthful message would be impermissible. Cf. *Zauderer*, 471 U.S. at 653, n.15.

petitioner's speech thus easily fails the fourth prong of *Central Hudson.*

More important than the lower court's failure to fashion an appropriate remedy is the absence of any objective basis for believing petitioner's speech to be inherently deceptive. Without a demonstrated likelihood of misleading the public (the only governmental interest the State asserts to justify its ban), no restriction on the speech would be permissible. *Amicus* respectfuly submits that the second and third prongs of *Central Hudson* require more, to support restrictions premised on the inherently misleading character of a commercial message, than the ipse dixit that fills the opinion below.

The State offered no evidence below that petitioner's speech had misled anyone; it presented no members of the public to testify about their understanding of petitioner's message; and it submitted no studies, expert testimony, or even anecdotal proof that the speech could mislead in an objectionable fashion. It relied, instead, entirely on its paternalistic and elitist notions of how the recipient of one of petitioner's letterheads would react, presumably believing that such recipient would have no more discrimination and judgment than does the audience for children's television. Cf. *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 73-74 (1983) (government may not limit the level of discourse "to that which would be suitable for a sandbox").

The court below thus relied purely on speculations about how persons could *mis*construe what petitioner had said rather than upon any falsity or misrepresentation in what he did say. It speculated that the National Board of Trial Advocacy could be a bogus organization with an unprincipled certification process, rather than upon the record evidence that the organization is respectable and that the profession accepts its certification as meaningful. This analysis hardly can be said to satisfy *Fox*'s requirement, as quoted above, that the government carry

the burden of justifying its restrictions and carefully calculate the cost of its actions.

Surely, even in the area of commercial speech, distaste for the subject matter of one's speech cannot support the censorship of that speech. See *Bolger*, 463 U.S. at 65, 72; cf. *Texas* v. *Johnson*, 105 L.Ed.2d 342, 360 (1989); *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 55-56 (1988). This Court's lawyer advertising decisions repeatedly have refused to countenance State arguments like those offered here. In *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), as here, the State defended its restrictions by labeling as misleading the term "legal clinic"; the reference to "very reasonable" prices; and the failure to indicate that name changes could be accomplished without an attorney. The Court rejected these "unpersuasive" assertions, noting the absence of record facts supporting the State's claim that these aspects of the advertisement would cause problems. *Id.* at 381. As Justice Brennan noted in his separate opinion in *Zauderer*, 471 U.S. at 659:

> Because of the First Amendment values at stake, courts must exercise careful scrutiny in applying these standards. Thus a State may not rely on "highly speculative" or "tenuous" arguments in carrying its burden of demonstrating the legitimacy of its commercial-speech regulations. [citing *Central Hudson*, 447 U.S. at 569.] Where a regulation is addressed to allegedly deceptive advertising either "is inherently likely to deceive" or must muster record evidence showing that "a particular form or method of advertising has in fact been deceptive," [quoting from *R.M.J.*], and it must similarly demonstrate that the regulations directly and proportionately remedy the deception. Where States have failed to make such showings, we have repeatedly struck down the challenged regulations.

Merely envisioning ways in which a truthful message could be misunderstood is not enough. "Deconstruction"

is not the standard for putting speech beyond the pale of the First Amendment.

Nothing in petitioner's message was factually, or inherently, deceptive or misleading. There certainly is no evidence to support the State's contention that readers would assume "certification" to be a State function. For example, going outside the factual record, as did the lower court, we would note that most members of the public know that checks are "certified" by banks, not governments. Most people likewise know that rabbis, rather than the Food and Drug Administration or other government instrumentalities, are responsible for certifying that foods are kosher and pareve. Movie ratings and the Good Housekeeping Seal of Approval are among the many other non-governmental attestations upon which people may choose to rely. It is not presumed that the public considers banks, or the Board of Rabbis, or the movie raters, or Good Housekeeping magazine, or the Girl Scouts who sell their boxes of cookies, to be government agencies by reason of their "certifications."

In the final analysis, the decision below rests on the State's belief that the public will be better served by ignorance than by information where attorneys are involved. This premise is faulty in several respects. As the Court observed at the outset of its modern commercial speech jurisprudence, in *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U.S. 748, 770 (1976): "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." 425 U.S. at 770. See also *Linmark Assoc., Inc.* v. *Willingboro*, 431 U.S. 85, 96-97 (1977); *Bolger*, 463 U.S. at 79 (Rehnquist, J., concurring in the judgment).

Nor, with all respect, can a principled basis be discerned for according lawyers different treatment from other speakers. The high professional standards of attorneys, and their importance to society, are not fundamentally different from the standards and importance of other profession and occupations. To define the professional's standards in terms of his advertising misses the point. As *Virginia Pharmacy Board* notes, there is no correlation between advertising and professional misconduct; while such misconduct can and should be severely penalized, that can be done without denying the public the benefit of truthful information that generates more informed decisionmaking.

Adopting *Virginia Pharmacy Board*'s reasoning for attorney advertising in *Bates*, 433 U.S. at 375, the Court deemed it "peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the information needed to reach an informed decision. . . . Moreover, the argument assumes that the public is not sophisticated enough to realize the limitation of advertising . . . . If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." The Court also stated:

> It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort.

Id. at 379.

The decision below reflects none of these sentiments. As a consequence, public ignorance is fostered in order to protect the public from the presumed deviousness of the same attorneys whose lofty ethics support the State's right to regulate in the first place. The ruling below is particularly unfortunate coming, as it does, in an era of increasing specialization by attorneys. As the Supreme Court of Alabama noted in *Ex Parte Howell*, 487 So. 2d at 851:

> It would be less than realistic for us to take the position that all lawyers, in fact, possess equal experience, knowledge, and skills with regard to any given area of legal practice. Although there is presently no state-sanctioned mechanism for identifying legal specialists, it appears to us that a certification of specialty by the NBTA would indicate a level of expertise with regard to trial advocacy in excess of the level of expertise required for admission to the bar generally. We conclude, therefore, that Howell's proposed advertisement of certification by the NBTA as a civil trial advocate would not be misleading or deceptive on its face.

No attorney advertises the areas in which he "concentrates" or "limits his practice"—representations the lower court appeared to condone, 126 Ill.2d 397, 534 N.E.2d 980, 985-86 (1989)—to suggest that he is poorly qualified to handle matters in those areas. Surely a lay person would surmise that an attorney who "concentrates" in person injury cases is better qualified to handle his automobile accident suit than an attorney who "limits his practice" to real estate. Where, then, lies the "substantial" governmental interest in permitting such circular representations of specialization while viewing direct statements to that effect as misleading? If the public is as easily misled or as ignorant as the State is forced to contend, it may well believe that attorneys advertise their concentrations in particular areas because they have been uniquely licensed to handle such matters.

The approved advertisements of "concentration," in other words, are as corrosive to the supposed interests being protected—if the public is as ignorant as the State postulates—as the disapproved statement of petitioner's certification. The divergent treatment accorded the two messages makes it still more difficult to see how the regulation here relates to a "substantial" government interest within the meaning of *Central Hudson's* second prong, or "directly advances" such an interest as required by the

third prong. Government restrictions on commercial speech cannot be permitted whenever the creative censor can imagine ways in which consumers might misunderstand simple, truthful statements. Otherwise all lawyer advertising will be subject to prohibition, *Bates* and its progeny notwithstanding, and the protections the Court has afforded other examples of commercial speech also will be for naught.

Perhaps nothing is more difficult to the person who needs legal advice than finding an attorney who practices in the area of his need. With a degree of specialization in the profession that makes many lawyers unqualified to handle all but a few types of legal problems, the public needs information, regardless of its imperfections, that will help it select qualified champions. If the bar itself is unwilling to certify attorneys in specialties, it surely should not be heard to complain that attorneys are turning to other, reputable sources to recognize their areas of expertise, or that they are announcing the results of those organizations' determinations in the restrained, wholly accurate, and professional terms used on petitioner's letterhead.

CONCLUSION

For these reasons, *amicus* respectfully submits that the judgment should be reversed.

Respectfully submitted,

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(6)

No. 88-1775

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GARY E. PEEL,

Petitioner,

—v.—

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

Respondent.

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., IN SUPPORT OF PETITIONER

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1. The Association of National Advertisers, Inc. (A.N.A.) moves the Court for leave to file the within brief *amicus curiae* in support of petitioner. Petitioner has consented to the filing of the brief. Respondent has declined to grant consent.

2. In support of its motion, A.N.A. avers:

(a) A.N.A. is an organization devoted to the advancement of truthful, non-deceptive advertising as a means of fostering the capacity of individual Americans to make informed and autonomous choices concerning lawful economic options open to them.

(b) A.N.A.'s members place more than 80% of all national and regional advertising in the United States.

(c) A.N.A. believes that government's role in the regulation of commercial advertising is to assist consumers in receiving truthful, non-deceptive information relevant to the making of informed and autonomous market choices.

(d) A.N.A. believes that where, as here, well-meaning government officials place overbroad restrictions on the flow of truthful information of assistance to consumers, the inevitable result is the stifling of competition and the deprivation of the consumer's First Amendment right to know.

(e) While certain potentially misleading assertions by lawyers concerning the quality of legal services may, given the unique status of the legal profession, be legitimately regulated, no basis exists to ban truthful, objective and verifiable information concerning a lawyer's qualifications to perform specific legal tasks requiring special expertise.

(f) Since respondent's prophylactic approach to regulating speech of significant value to consumers appears at variance with the prior decisions of the Court affording First Amendment protection to truthful commercial speech, A.N.A. moves for leave to file the within brief *amicus curiae* in the hope that it will aid the Court in its analysis.

Dated: New York, NY
August 28, 1989

/s/ BURT NEUBORNE

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QUESTIONS PRESENTED

1. Is the truthful recitation by a lawyer on his professional letterhead that he has been certified as a civil trial specialist by the National Board of Trial Advocacy "commercial" speech in the absence of any showing that the recitation was intended, or perceived, as a solicitation of business?

2. May the truthful recitation by a lawyer that he has been certified as a civil trial specialist by the National Board of Trial Advocacy be labelled as misleading by the Illinois Attorney Registration and Disciplinary Commission in the absence of any factual basis for the Commission's so-called finding?

3. May the Illinois Attorney Registration and Disciplinary Commission prohibit a lawyer from truthfully reciting the objective, verifiable fact that he has been certified as a civil trial specialist pursuant to the rigorous standards of the National Board of Trial Advocacy merely because other lawyers or groups might make potentially misleading assertions concerning the quality of legal services?

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Interest of *Amicus Curiae*

The interest of *amicus curiae* is set forth in the accompanying motion for leave to file this brief.

Statement of the Case

Amicus adopts the statement of the case set forth in the brief for petitioner.

Summary of Argument

Illinois' attempt to censor petitioner's speech violates the First Amendment for three reasons. First, since the speech in question did not propose a commercial transaction, it does not fall within the narrow category of "commercial" speech.

Rather, it is entitled to plenary free speech protection because it transmits information of significant interest to the public at large and is more akin to self-affirming speech than to a solicitation of business.

Second, viewed as "commercial" speech, petitioner's recital cannot be deemed misleading, since it is factually accurate and respondent has made no attempt to satisfy its heavy evidentiary burden of proving that petitioner's speech actually misleads. Conclusory assertions that factually accurate speech is misleading cannot justify governmental censorship.

Third, at least three obvious techniques exist for Illinois to protect consumers against misleading assertions concerning the quality of legal services without banning petitioner's speech. A combination of the use of disclaimers, the prohibition of misleading assertions and the regulation of accrediting organizations would satisfy Illinois' interests without depriving consumers of valuable information. Accordingly, the use of a blanket, overbroad prohibition violates the First Amendment.

Argument

THE FIRST AMENDMENT PRECLUDES ILLINOIS FROM IMPOSING A BLANKET PROHIBITION ON A LAWYER'S ABILITY TO RECITE ON HIS PROFESSIONAL LETTERHEAD THE TRUTHFUL FACT THAT HE HAS BEEN CERTIFIED AS A CIVIL TRIAL SPECIALIST BY THE NATIONAL BOARD OF TRIAL ADVOCACY

A. Introductory Statement

Until 1975, a structural divide in First Amendment theory provided effective protection to speech about religion, science, politics and art; but virtually no protection to speech in an economic context. Compare *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) with *Valentine v. Chrestensen*, 316 U.S. 52 (1942). During the past 15 years, the Court has partially bridged the structural divide between "political" and "economic" speech by affording speech about

consumer affairs significant First Amendment protection[1] and by suggesting the existence of First Amendment constraints in the areas of labor relations and capital formation.[2]

The Court's modern "economic" speech cases reflect a recognition that the uncensored flow of information is as important to the proper functioning of a free market economy as it is to the success of a political democracy. Since both systems depend upon the informed choices of free men and women, the functional integrity of each requires a free flow of information to both voters and consumers.

The Court has, however, continued to recognize a distinction between classic "political" speech and speech that proposes a commercial transaction. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 563 n. 5 (1980). For example, while obnoxious political ideas receive plenary First Amendment protection whether or not we deem them true, false or misleading "commercial" speech is entitled to no constitutional protection because it is of no help to the consumer in making an informed market choice. Compare *National Socialist Party v. Skokie*, 432 U.S. 43 (1977) with *Bates v. State Bar of Arizona*, 433 U.S. 350, 385 (1977) and *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S 557, 563 n. 6 (1980).

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1 Eg. *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Carey v. Population Services Int'l.*, 431 U.S. 678 (1977); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447 (1978); *Friedman v. Rogers*, 440 U.S. 1 (1979); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980); *In re RMJ*, 455 U.S. 191 (1982); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Posadas de Puerto Rico v. Tourism Co.*, 478 U.S. 328 (1986); *Shapero v. Kentucky Bar Ass'n*, 108 S.Ct. 1916 (1988); *Board of Trustees of the State University v. Fox*, _____ U.S. _____, 57 USLW 5015 (1989).

2 *Lowe v. SEC*, 472 U.S. 181 (1985); *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, _____ U.S. _____, 108 S.Ct. 1392 (1988).

Illinois' attempt to forbid attorneys from truthfully reciting on their professional letterheads that they have satisfied the rigorous standards for certification as a civil trial specialist by the National Board of Trial Advocacy (NBTA) raises three significant issues in the context of the Court's economic speech cases: First, is a professional letterhead directed to colleagues and existing clients that truthfully recites a significant professional achievement "commercial" speech at all? Second, if petitioner's letterhead is to be measured under the standards governing the commercial speech doctrine, has Illinois carried its significant factual burden of proving that the speech is actually false or misleading? Third, if the broad category of speech used by petitioner—a statement of professional qualification—is potentially capable of including false and misleading assertions, may Illinois impose a prophylactic ban on the entire category of speech, even though obvious methods exist to separate truthful, objectively verifiable information that is helpful to consumers from assertions that risk misleading them?

B. In the Factual Context of this Case, Petitioner's Recital of a Significant Professional Achievement On His Business Letterhead Is Not "Commercial" Speech Because It Did Not "Propose a Commercial Transaction".

Where, as here, the recital of petitioner's professional achievement was neither designed as a solicitation of business, nor was likely to have been perceived as such by a recipient, the communication does not fall under the narrow, less protected category of "commercial" speech. Rather, it is an example of the type of self-affirming speech that qualifies for the highest level of First Amendment protection. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981).

The Court has repeatedly recognized that speech may not be deemed "commercial" merely because it takes place in an economic context. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Thus, newspaper advertisements discussing public issues are entitled to plenary First Amendment protection. Corporate speech discussing public issues of concern to the corporation's economic health is entitled to full First Amendment protection.

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978). The selling of books, newspapers and magazines at a profit is fully protected by the First Amendment. Eg. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Smith v. California*, 361 U.S. 147 (1959). The solicitation and contribution of funds to charitable and political organizations receives First Amendment protection. Eg. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Riley v. National Federation of the Blind of North Carolina*, 108 S.Ct. 2667 (1988).

Under the Court's cases, the touchstone of "commercial" speech cannot be the fact that it takes place in an economic context, or that it may have economic consequences for the speaker. Rather, "commercial" speech should be confined to the actual proposal of a commercial transaction. *Board of Trustees of the State University v. Fox*, ____ U.S. ____, 57 USLW 5015, 5019 (1989). When, as here: (1) a speaker does not propose a commercial transaction; (2) the content of the message is of significant informational value to the general public; and (3) the hearers' interests are broader than deciding whether to undertake a discrete commercial transaction, the speech can no longer properly be characterized as "commercial" and subjected to a lesser degree of constitutional protection.

Petitioner's interest in reciting his NBTA certification on his professional letterhead was not the solicitation of new business. While the same message delivered in the context of a communication directed to the consuming public would constitute an invitation to trade[3], the colleagues and existing clients who were the recipients of petitioner's professional letterheads were not prospective customers. They were already either professional colleagues or clients. Accordingly, the speech in this case is more akin to a proud recital of a professional achievement than it is to a solicitation to engage in a commercial transaction.

Petitioner has every right to be proud of his certification as a civil trial specialist by the National Board of Trial Advocacy. The rigorous standards applied by the NBTA and the relatively few lawyers who qualify for certification, render petitioner's

3 *In re RMJ*, 455 U.S. 191 (1982).

achievement a mark of professional distinction, similar to an academic honor, a Bar Association award, a recognition of community service or a position of public trust. The natural tendency of any person, professional or not, is to inform colleagues and acquaintances of such personal and professional achievements, not because they translate into commercial advantage, but because they form the matrix of pride and aspiration that is the hallmark of a society based on civic virtue and hard work.

The widespread practice of displaying diplomas, bar admissions, professional awards and public service testimonials prominently in lawyers' offices is witness to the human desire to recite the personal and professional achievements of which we are most proud. If petitioner had prominently displayed his NBTA certification on the wall of his office, presumably not even the long arm of the Illinois Attorney Registration and Disciplinary Commission would have bothered him. The result should not be different because he recited his achievement on his professional letterhead in the context of routine professional communications to colleagues and existing clients.

Moreover, wholly apart from any commercial considerations, the content of petitioner's message is of significant informational value both to specific hearers and to the general public. The quality of legal services is of critical importance to American society. Traditionally, American lawyers have operated as generalists, with each lawyer holding him or herself out to the general public as qualified to perform virtually every legal task. Whatever the wisdom of maintaining the generalist *status quo*, and whatever the very real problems involved in regulating assertions of quality by lawyers, the existence of reputable private organizations like NBTA capable of developing and applying rigorous criteria to measure the expertise of lawyers in given areas of practice is of obvious importance to the general public in deciding whether to modify the *status quo*. Bluntly put, nothing serves the *status quo* in any setting so well as censorship that prevents the public from learning of potential alternatives.

When, as here, government seeks to censor truthful speech that does not propose a commercial transaction, but that involves: (1) a speaker's affirmation of pride in a significant achievement; (2) a message that is corrosive of the *status quo*; and (3) a hearer's interest in obtaining relevant information, government may not characterize the speech as "commercial" in order to induce a lower threshhold of constitutional protection. Rather, government must satisfy the onerous preconditions to censorship imposed by plenary First Amendment protection. Not even respondent claims that such a burden can be met.

C. Illinois Has Made No Attempt to Establish a Factual Basis for Its Unsupported Assertion That Petitioner's Letterhead is Actually Misleading

The attempt to brand as misleading petitioner's recital that he has been certified as a civil trial specialist by the National Board of Trial Advocacy suffers from an acute embarrassment—the statement is completely truthful and accurately reflects the fact that petitioner has satisfied exacting criteria established by a nationally respected organization devoted to improving the quality of advocacy in the Nation's courts. Faced with the factual accuracy of petitioner's recital and with the exacting nature of NBTA's criteria, Illinois argues, first, that the word "certified" as used on petitioner's letterhead is misleading because it connotes an official state imprimatur; and, second, that the word "specialist" may imply an unduly high level of competence. Neither argument can withstand scrutiny.

Petitioner's professional letterhead recites that he has been "certified" as a civil trial specialist by the National Board of Trial Advocacy, not the State of Illinois. No hint of State endorsement occurs in the message. It can hardly be contended that the word "certified" has acquired such a strong secondary meaning that it inevitably suggests government approval. After all, "certified" checks are not government checks and not one of the dictionary definitions of the term even suggests government approval. *Webster's New International Dictionary*, 2d.ed., p. 441.

Given the obvious semantic weakness of respondent's attempt to equate "certified" with "governmentally approved", Illinois must demonstrate a factual basis for its assertion that it is inherently misleading to use the word "certified" in the context of a private group. When, as here, First Amendment rights are at issue, government *ipse dixit* cannot substitute for a factual record. In each context in which the issue has arisen, the Court has been careful to require a would-be governmental censor to prove—not assume—the factual predicate for censorship. Eg. *Consolidated Edison Co. v. Public Service Comm'n.*, 447 U.S. 530, 540 (1980); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam). See also *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986).

Respondent made absolutely no effort to develop a factual record to support its assertion that the use of the word "certified" would cause hearers to believe that petitioner had received a State imprimatur. Not a single recipient of petitioner's letterhead was asked whether he or she had been misled. Nor did respondent adduce any other factual support for its position. Indeed, the only support in the record for respondent's attempt to brand petitioner's speech as misleading is respondent's conclusory assertion that it is misleading. Such a circular process cannot possibly establish a basis for censorship.

Since the very existence of constitutional protection for commercial speech turns on its truthful character, the Court has refused to allow the commercial speech doctrine to be eroded by the conclusory use of a "misleading" label. Eg. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) ("legal clinic" not misleading; "very reasonable" not misleading; failure to state that name change could be obtained *pro se* not misleading; price advertising for routine legal services not inherently misleading); *In re RMJ*, 455 U.S. 191 (1982) (description of practice not misleading; recital of states of licensure not misleading); *Zauderer*

v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (accurate general legal advice not misleading; use of accurate illustrations not misleading; accurate recitation that had handled similar cases not misleading). Only when a statement is factually inaccurate or incomplete has the Court deemed it misleading. Eg. *Federal Trade Comm'n v. Colgate Palmolive Co.*, 380 U.S. 374 (1965) (simulated T.V. experiments misleading); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (failure to disclose potential personal liability for costs misleading). Measured by such a common-sense standard, Illinois has not provided any support for its attempt to brand petitioner's use of the word "certified" as misleading.

Respondent's argument that the word "specialist" is misleading is even weaker. Once again, respondent has not even attempted to build a factual record in support of its assertion. In fact, as with the term "legal clinic" in *Bates*, the term "specialist" conveys a rough meaning that is of clear assistance to a potential consumer. Of course, were an unqualified or insufficiently experienced lawyer to use the phrase, it would be misleading. But where, as here, an experienced litigator recites that a nationally respected association of lawyers and judges has deemed him qualified to call himself a civil trial "specialist", that information, if deemed commercial speech at all, can only assist consumers in making an informed choice.

D. Respondent May Not Ban Truthful, Objective and Verifiable Statements of Fact Concerning the Quality of Legal Services Merely Because Subjective, Non-Verifiable Assertions of Quality May Be Misleading

Ordinarily, advertising is designed to inform consumers about three things: availability, price and quality. In the context of advertising by lawyers, the Court has recognized that the First Amendment protects truthful advertising of the price and availability of legal services, but has been reluctant to accord constitutional protection to subjective, non-verifiable assertions as to quality. *Bates v. State Bar of Arizona*, 433 U.S. 350, 366 (1977); *In re RMJ*, 455 U.S. 191, 201 (1982); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 640 n. 9 (1985);

Shapero v. Kentucky Bar Ass'n, 108 S.Ct. 1916 (1988). Unlike most commercial settings, in which consumers are able to assess the quality of a service, the complexity of legal practice renders it difficult for a consumer to evaluate certain subjective, non-verifiable assertions concerning the quality of legal representation. Accordingly, the Court has expressed concern over the prospect of misleading statements and a degradation of the legal profession.

Assuming *arguendo* that the Court's concerns would justify a refusal to permit advertisements by lawyers containing potentially misleading assertions as to the quality of legal representation, the issue posed by this case is whether a prophylactic ban on objective and verifiable factual statements similar to petitioner's violates the First Amendment.

In *Board of Trustees of the State University v. Fox*, ____ U.S. ____, 57 USLW 5015 (1989), the Court reaffirmed the four part test governing commercial speech set forth in *Central Hudson*. Under the fourth prong of the *Central Hudson* test as applied in *Fox*, a censor may not ban truthful commercial speech if obvious alternatives exist that protect the State's interest without resorting to censorship. While *Fox* made clear that the search for a less drastic alternative to censorship was not to be mechanistically transformed into an insistence upon the least drastic means, *Fox* reiterated the Court's longstanding refusal to tolerate "substantially excessive" attempts at censorship. 57 USLW at 5018. For example, in *In re RMJ*, 455 U.S. 191, 203 (1982), the Court noted:

> . . . the States may not place an absolute prohibition on certain types of potentially misleading information, eg. a listing of areas of practice, if the information also may be presented in a way that is not deceptive.

Similarly, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Court refused to approve prophylactic bans on general legal advice and illustrations in lawyer's advertising merely because each was capable of being abused. Instead, the Court held:

> Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful. 471 U.S. at 646.

See also *Shapero v. Kentucky Bar Ass'n.*, 108 S.Ct. 1916 (1988).

In this case, three obvious methods exist to permit Illinois to deal with potentially misleading speech without interfering with the free flow of truthful speech.

First, the Court has repeatedly noted that regulators of attorney advertising remain free to require disclaimers or additional disclosures if necessary to prevent a misleading statement. Eg., *In re RMJ*, *supra*; *Zauderer v. Office of Disciplinary Counsel*, *supra*.

Second, the Court has indicated that given the unique status of the legal profession, regulators may distinguish between certain subjective, non-verifiable assertions as to the quality of legal services and objective, verifiable statements of fact. Respondent has offered no evidence or authority of any kind to explain why it is necessary to ban facts in order to deal with misleading assertions. In *Zauderer*, the Court responded to an identical attempt to ban all illustrations from lawyer's advertisements:

> The State's arguments amount to little more than unsupported assertions: nowhere does the State cite any evidence or authority of any kind for its contention that the potential abuses associated with the use of illustrations in attorney's advertising cannot be combated by any means short of a blanket ban.
>
> * * *
>
> We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forgo that task in favor of the more convenient but far more restrictive alter-

native of a blanket ban on the use of illustrations. 471 U.S. at 649.

Finally, regulators remain free to set standards and to establish procedures to assure the trustworthiness of any private accrediting agency. Indeed, that is precisely what the Supreme Courts of Alabama and Minnesota did when confronted with this issue. *In re Johnson*, 341 N.W. 2d 282 (Minn. 1983); *Ex parte Howell*, 487 So. 2d 848 (Ala. 1986). Illinois stands alone in having adopted a policy of prophylactic censorship.

Fox makes it clear that the burden rests squarely on Illinois to explain why a combination of disclaimer, prohibition of misleading assertions and regulation of accrediting groups is not sufficient. 57 USLW at 5018. It is a burden that Illinois has not even attempted to carry. Accordingly, since Illinois has not "presented a convincing case for its argument that the rule . . . is necessary to the achievement of a substantial governmental interest", its attempt at prophylactic censorship must fail. 471 U.S. at 644.

Conclusion

For the above-stated reasons, the decision of the Illinois Supreme Court should be reversed.

Respectfully submitted,

Dated: August 28, 1989
New York, New York

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Pursuant to Rule 36.3 of the rules of this court, *amici* respectfully move for leave to file the attached brief *amici curiae* in support of petitioner. Petitioner has consented to the filing of this brief. This motion is made necessary by the respondent's policy of blanket refusal to provide consent to all *amici curiae*.

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of its resources to promoting commercial free speech rights. WLF has

appeared as *amicus curiae* in a number of cases dealing with commercial free speech issues such as *Pacific Gas and Electric v. Public Utility Commission of California*, 475 U.S. 1 (1986) and *Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530 (1980). In addition, WLF has appeared before Congressional subcommittees and regulatory agencies which have sought to restrict the rights of businesses. On July 25, 1989 WLF testified before the House Energy and Commerce Subcommittee on Transportation and Hazardous Materials on the issue of the constitutionality of certain proposed restrictions on advertising, promotion, and other commercial practices concerning tobacco products. WLF has worked with coalitions interested in the issue of commercial free speech. Finally, the Legal Studies Division of WLF has published several works on advertising bans and restrictions, including articles by former Federal Communications Commission Chairman Richard Wiley and American Civil Liberties Union Legislative Counsel Barry Lynn.

The Outdoor Advertising Association of America (OAAA) is a national trade association comprised of approximately 200 outdoor advertising companies operating in 46 states and representing the majority of the billings of outdoor advertisers. Founded in 1891, the OAAA appears before committees of Congress and state legislatures on issues affecting commercial free speech.

The Point of Purchase Advertising Institute (POPAI) is a national advertising trade association based in Englewood, New Jersey. POPAI has an active and large membership of entities involved in point of purchase advertising and in issues affecting commercial free speech.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus* before this Court on a number of occasions. AEF believes that the public interest is best served by full and robust debate on commercial issues, and that laws prohibiting such speech are wholly at odds with the guarantee of freedom of speech provided by the First Amendment.

For the foregoing reasons, *amici curiae* respectfully request that they be allowed to participate in this case and file the annexed brief *amici curiae*. *Amici* are in a unique position to aid the Court in its consideration of the issues presented. The interests of *amici* are direct and substantial. The participation of the *amici* will facilitate the Court's thorough consideration of the issues and will bring important perspectives to bear. Accordingly, *amici* respectfully request that their motion for leave to file an *amici curiae* brief in support of petitioner be granted.

Respectfully submitted,

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September 2, 1989

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INTEREST OF THE AMICI CURIAE

The interests of the *amici curiae* are set out fully in the Motion for Leave to File accompanying this brief.

STATEMENT OF THE CASE

The relevant facts are simple and undisputed. Petitioner Gary E. Peel is an attorney licensed to practice law in the State of Illinois. In 1983, Mr. Peel began placing on his attorney letterhead the factual statement that he was certified as a civil trial specialist by the National Board of Trial Advocacy ("NBTA").[1] Mr. Peel in the normal course of business distributed the letterhead to fellow attorneys, opposing litigants, and existing clients. Mr. Peel contends that he did not use the letterhead, or the statement that he was a certified specialist, as part of any direct effort to solicit new clients, and Respondent has introduced no evidence to the contrary.

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[1] Founded in 1976, NBTA is an organization dedicated to improving the quality of the trial bar and enhancing the delivery of legal services to the public by providing a reliable national credentialling process for specialists in trial advocacy. NBTA certifies only those who meet its exacting objective standards of experience, ability, and concentration in trial advocacy. The organization is sponsored by the American Trial Lawyers Association, the International Society of Barristers, the National Association of Criminal Defense Attorneys, the National Association of Women Lawyers, the American Board of Professional Liability Attorneys, and the National District Attorneys' Association. And it is overseen by a distinguished board of judges, practitioners, and academics. At no stage of this proceeding has Respondent introduced any evidence challenging the *bona fides* of NBTA or its certification process.

In 1986, during the course of Mr. Peel's representation of other attorneys in proceedings before Respondent Attorney Registration and Disciplinary Commission of Illinois ("ARDC"), the Administrator of the ARDC became aware that Mr. Peel's letterhead included the statement regarding NBTA certification. The Administrator thereafter initiated a complaint against Mr. Peel, alleging, *inter alia*, that the letterhead statement violated Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility, which states that except in very limited circumstances (not applicable to Mr. Peel) "no lawyer may hold himself out as 'certified' or a 'specialist.'"

At a hearing before the ARDC Hearing Board, the Administrator introduced no evidence that the letterhead statement was misleading or that anyone had been misled by the statement. Nor did the Administrator introduce any evidence that Mr. Peel had ever used his letterhead to solicit business from potential clients. Nonetheless, the Hearing Board found that the letterhead statement violated Rule 2-105(a)(3), a finding that was upheld by the ARDC Review Board and the Illinois Supreme Court. *See In re Peel*, 126 Ill.2d 397, 534 N.E.2d 980 (1989). The Illinois Supreme Court adopted the Review Board's recommendation that Mr. Peel be censured for his conduct. 534 N.E.2d at 986.

At all stages of this proceeding, Mr. Peel has challenged the constitutionality of Rule 2-105(a)(3) and its application to him. Mr. Peel contended, *inter alia*, that the disciplinary rule violated his freedom of speech under the First and Fourteenth Amendments. The Illinois Supreme Court considered and rejected that contention, asserting that Mr. Peel's letterhead statement was misleading and therefore not entitled to First and Fourteenth Amendment protection. 534 N.E.2d at 984.

SUMMARY OF THE ARGUMENT

The Illinois Supreme Court violated Mr. Peel's rights to free speech guaranteed by the First and Fourteenth Amendments when it censured him. That court's action was unconstitutional regardless of whether Mr. Peel's speech is properly classified as commercial speech or, as *amici* contend, as noncommercial speech.

This Court has defined commercial speech as speech that proposes a commercial transaction. The statement contained in Mr. Peel's letterhead is properly classified as noncommercial speech because it does not propose such a transaction; indeed, Mr. Peel never sent the letterhead to potential clients. The fact that Mr. Peel distributed his letterhead in the course of conducting his business affairs does not transform what would otherwise be noncommercial speech into commercial speech. The Court should not expand the current definition of commercial speech to include Mr. Peel's letterhead statement; to do so would lead to confusion as to the distinction between commercial speech and, consequently, a chilling of First Amendment rights. Because Mr. Peel's letterhead statement is noncommercial speech, Illinois may not regulate the statement in the absence of a compelling interest for doing so, and Illinois has failed to articulate such an interest.

Even if Mr. Peel's letterhead statement is properly classified as commercial speech, Illinois acted unconstitutionally in censuring Mr. Peel for that statement. A State may regulate commercial speech that is neither misleading nor related to an unlawful activity only upon a showing that: (1) the State has a substantial interest that it seeks to achieve; (2) the regulation directly advances the asserted interest; and

(3) the regulation is no more extensive than necessary to serve that interest. The ARDC has failed to make any of the required showings. It introduced no evidence to show that Mr. Peel's letterhead is actually misleading. The ARDC has failed to articulate a substantial State interest in regulating the content of attorney letterhead not sent to potential clients. Moreover, the ARDC's prohibition on disclosing NBTA certification does not directly advance its interest in seeing that consumers choose attorneys wisely, because the result of the prohibition is to prevent consumers from obtaining any information regarding the quality of attorneys whom they are considering retaining. Finally, the ARDC's prohibition on disclosing NBTA certification is far more extensive than is necessary to serve the ARDC's interest, because experience in other States demonstrates the workability of a system that regulates attorneys' claims as to the quality of their services without banning such claims altogether.

ARGUMENT

I. PETITIONER'S LETTERHEAD STATEMENT REGARDING NBTA CERTIFICATION IS NONCOMMERCIAL SPEECH, AND THUS ARDC'S ATTEMPTS TO REGULATE THAT STATEMENT CANNOT SURVIVE EXACTING FIRST AND FOURTEENTH AMENDMENT SCRUTINY.

While recognizing that commercial speech, like other varieties of speech, is protected by the First and Fourteenth Amendments, this Court has granted the States greater leeway in regulating commercial speech than in regulating noncommercial speech. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). In rejecting

Petitioner's contention that his letterhead statement regarding NBTA certification was constitutionally protected, the Illinois Supreme Court clearly assumed that the statement constituted commercial speech and thus was entitled to a lower level of protection than that normally afforded to noncommercial speech. 534 N.E.2d at 984.

The Illinois Supreme Court erred in classifying Petitioner's letterhead statement as commercial speech. This Court's precedents establish that the statement should be classified as noncommercial speech. The ARDC's attempts to prohibit the statement violate the severe restrictions imposed by the First and Fourteenth Amendments on the States' authority to regulate noncommercial speech.[2]

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[2] In its opposition to Mr. Peel's petition for certiorari, the ARDC contended that Mr. Peel waived his right to assert that his letterhead statement should be classified as noncommercial speech for purposes of First Amendment analysis because, the ARDC contended, Mr. Peel failed to make that assertion before the Illinois Supreme Court. *See* Brief in Opposition to Petition for Certiorari at 12. The ARDC's contention is without merit. It is uncontested that at all stages of this proceeding Mr. Peel has asserted that the ARDC's attempts to discipline him violated his free speech rights under the First and Fourteenth Amendments. For purposes of determining whether Mr. Peel has waived the right to assert particular arguments in support of his free speech claim, it is irrelevant whether those arguments were raised below so long as the free speech claim was itself presented. "Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899). *See Bankers Life and Casualty Co. v. Crenshaw*,

A. Petitioner's Letterhead Is Not Commercial Speech Because It Does Not Propose a Commercial Transaction.

This Court on several occasions has been called upon to differentiate between commercial and noncommercial speech. While declining to establish precise contours for commercial speech, the Court has defined "commercial speech" as speech that "propose[s] a commercial transaction." *Board of Trustees of State University of New York v. Fox*, 109 S.Ct. 3028, 3031 (1989); *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 562 (1980); *Virginia State Board of Pharmacy*, 425 U.S. at 762.

Under that definition, Mr. Peel's inclusion on his attorney letterhead of the truthful statement that he is certified as a civil trial specialist by NBTA qualifies as noncommercial speech. The letterhead statement does not propose a commercial transaction with anyone. While such a statement contained in an advertisement could well be construed as commercial speech, there was no evidence below that Petitioner's letterhead had ever been mailed to any layperson who was not already a client, or that Petitioner had ever used that letterhead, or the statement regarding NBTA certification, in the yellow pages, or in any advertisement, brochures, or other types of printed materials. Indeed, Petitioner testified before the ARDC Hearing Board that he had not done so. Since Petitioner never sent his letterhead

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108 S.Ct. 1645, 1655 (1988)(O'CONNOR, J., concurring in part and concurring in judgment); *Illinois v. Gates*, 462 U.S. 218, 219-20, 248 (1983)(WHITE, J., concurring in judgment).

to potential clients (the sole group with which he would be interested in entering into a commercial transaction), it follows that the letterhead does not propose a commercial transaction.

It is true that Mr. Peel distributed his letter solely in connection with the conduct of his business affairs; but such a connection does not transform noncommercial speech into commercial speech. The Court repeatedly has stated that speech does not lose its full First Amendment protection simply because it is uttered for a profit. *See Board of Trustees of State University of New York*, 109 S.Ct. at 3036 (providing tutoring services, legal advice, and medical consultation for a fee do not constitute commercial speech because they do not propose a commercial transaction, even though they consist of speech for a profit); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983) ("the fact that Youngs has an economic motivation for mailing the pamphlets [discussing use of contraceptives] would clearly be insufficient by itself to turn the material into commercial speech"); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (advertisement in newspaper soliciting funds for civil rights organization held entitled to full First Amendment protections).

Indeed, if all speech uttered in connection with a commercial business activity were classified as commercial speech, then no profit-seeking corporation could ever engage in noncommercial speech, since by definition all speech engaged in by a profit-seeking corporation is connected with its business activities. Yet the Court has made clear that corporations are entitled to engage in noncommercial speech that enjoys the highest level of First Amendment protection. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

Nor is speech transformed into commercial speech simply because it is theoretically possible that a potential client might see Mr. Peel's letterhead and be persuaded thereby to engage Mr. Peel's services. The test is whether the speaker *proposes* a commercial transaction. *Virginia State Board of Pharmacy*, 425 U.S. at 762. In the absence of any evidence that Mr. Peel included NBTA certification information in his letterhead for the purpose of proposing or encouraging commercial transactions -- or evidence that Mr. Peel even contemplated that commercial transactions would result from inclusion of the information -- the letterhead cannot be classified as commercial speech. The State of Illinois has no more right to dictate to Mr. Peel the content of letterhead not sent to prospective clients than it has to direct the Chicago Tribune not to include the words "World's Greatest Newspaper" on the masthead of newspapers sent to its subscribers; neither case involves commercial speech because in neither case is a commercial transaction proposed.

B. Expanding the Definition of Commercial Speech to Cover Petitioner Would Lead to Confusion and Chilling of First Amendment Rights.

In differentiating between commercial and noncommercial speech, the Court has emphasized the "commonsense differences between speech that does no more than propose a commercial transaction ... and other varieties." *Virginia State Board of Pharmacy*, 425 U.S. at 771 n.24. The line drawn by the Court between these two types of speech is thus a relatively bright line that allows speakers to know with some degree of certainty which side of the line they fall on. As demonstrated above, Mr. Peel's letterhead clearly falls on the noncommercial side of the line as now drawn.

The ARDC apparently seeks a redrawing of that line such that any statement made by an attorney regarding his qualifications to practice law -- whether or not made for the purpose of proposing a commercial transaction -- would be classified as commercial speech. *See* Brief in Opposition to Petition for Writ of Certiorari at 14. Any such redrawing, by blurring the current bright-line distinction between commercial and noncommercial speech, would create significant confusion as to that distinction and would lead to a chilling of First Amendment rights.

The Court has consistently recognized that freedom of expression needs "breathing space" in order to survive. *New York Times Co. v. Sullivan*, 376 U.S. at 272. In order to "insure that the flow of truthful and legitimate .... information is unimpaired" (*Virginia State Board of Pharmacy*, 425 U.S. at 771 n.24), the Court has gone to great lengths to ensure that those wishing to engage in protected noncommercial speech not be deterred from doing so out of fear of punishment for their speech. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (litigants whose noncommercial speech may properly be regulated have standing to challenge a substantially overbroad statute on First Amendment grounds, in order to prevent chilling effect statute may have on others whose speech is fully protected under First Amendment). Yet, redrawing the line between commercial and noncommercial speech as proposed by the ARDC would lead to just such a chilling of protected noncommercial speech. The current formulation for distinguishing between commercial and noncommercial speech (whether the speech "proposes a commercial transaction") is readily understandable by the average citizen: a businessman knows that so long as his speech does not propose a commercial trans-

action[3] and is not indecent, obscene, or libelous, his speech is protected by the almost-unlimited protections of the First Amendment. If the definition of commercial speech is expanded to include statements by a lawyer that do not propose a commercial transaction but that bear on his qualifications to practice law, the bright-line distinction between commercial and noncommercial speech will be lost. We can conceive of no other line that would permit a businessman readily to distinguish between commercial and noncommercial speech. The inevitable result would be the chilling of valuable and fully protected noncommercial speech by those who feared that their speech might be classified as commercial speech.

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[3] This is not to suggest that under the current formulation speech may not be classified as commercial speech in the absence of an explicit proposal for a commercial transaction. Obviously, a newspaper advertisement listing an attorney's name, address, and phone number and noting his NBTA certification would constitute commercial speech, notwithstanding the absence from the advertisement of any explicit proposal such as "Please call for an appointment." *See Virginia State Board of Pharmacy*, 425 U.S. at 764-65 (pharmacist cannot transform advertisement into noncommercial speech by casting himself as "a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof"). The key distinction between commercial and noncommercial speech is the intent of the speaker: speech is commercial if it is uttered with the intent of bringing about a commercial transaction, regardless of the precise language used.

Expanding the definition of commercial speech to include all statements by an attorney regarding his qualifications to practice law quite clearly would encompass much speech uttered without thought of proposing a commercial transaction. In many cases, such statements are made in order to lend credence to other statements made by the attorney. An attorney speaking before a bar association group or writing an article in a legal publication may believe that his audience will justifiably pay closer heed to what he has to say if he prefaces his remarks with a listing of work experience that makes him qualified to speak. Similarly, an attorney writing to fellow attorneys and existing clients might believe that the statements contained in the letter would justifiably have more persuasive force if accompanied (in the letterhead) by a statement of the attorney's qualifications. Such statements regarding qualifications convey valuable information, and in the absence of evidence that such statements are conveyed for the purpose of proposing a commercial transaction, they should not be subject to the broad regulation that the States may impose upon commercial speech.

Moreover, the justifications advanced by the Court for permitting greater regulation of commercial speech than of noncommercial speech argue against an expansion of the definition of commercial speech to include all statements by an attorney regarding his qualifications to practice law. Commercial speech is thought to be "more durable" than noncommercial speech and less likely to be chilled because businessmen whose livelihood depends on attracting customers through advertising are thought unlikely to be deterred

by State regulation of such advertising.[4] Statements by attorneys regarding their qualifications to practice law made not in the context of proposing a commercial transaction are much less likely to endure extensive State regulation than is speech normally classified as commercial speech. Since by definition speech in the former category has a lesser impact on an attorney's financial well-being than speech in the latter category, an attorney is much more likely to forego speech in the former category in the face of extensive State regulation. It is precisely that type of chilling effect that the First Amendment was designed to prevent. *Virginia State Board of Pharmacy*, 425 U.S. at 770.

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[4] The Court has advanced two justifications for affording less First Amendment protections for commercial speech:

> The truth of commercial speech .... may be more easily verified by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, *commercial speech may be more durable than other kinds*. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely. [¶] Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.

Virginia State Board of Pharmacy, 425 U.S. at 771 n.24 (emphasis added).

In conclusion, the Court should not expand the definition of commercial speech to include speech that does not propose a commercial transaction. Since the statement on Mr. Peel's letterhead does not propose a commercial transaction, it is not commercial speech.

C. Petitioner's Letterhead Statement May Not Be Prohibited in the Absence of a Compelling State Interest in Doing So.

The Court has made clear that a State may not prohibit noncommercial speech of the type at issue here in the absence of a compelling interest for doing so. *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 540 (1980); *First National Bank of Boston v. Bellotti*, 435 U.S. at 786. Moreover, the burden is upon the State to demonstrate its compelling interest. *Id.*

The State of Illinois has not introduced any evidence of a compelling interest in suppressing Mr. Peel's speech, nor has it even contended that such a compelling interest exists. Accordingly, its censure of Mr. Peel cannot survive First Amendment scrutiny.

Alternatively, even if the ARDC could constitutionally regulate Mr. Peel's speech, Rule 2-105(a)(3) must be voided as substantially overbroad. *See Board of Trustees of State University of New York*, 109 S.Ct. at 3035-38. Rule 2-105(a)(3) categorically prohibits lawyers from holding themselves out as "certified" or as a "specialist." Whether or not the ARDC has a compelling interest in preventing Mr. Peel from listing his NBTA certification on his letterhead, it surely cannot claim such an interest in preventing all statements by lawyers regarding their special areas of expertise. For example, the ARDC could have

absolutely no basis for preventing an attorney, upon request of a prospective employer, from telling the employer the areas of law in which he has developed an expertise or to tell the employer that he has been certified by NBTA. Yet, the overbroad sweep of Rule 2-105(a)(3) would prohibit such speech. Accordingly, Rule 2-105(a)(3) must be struck down as an overbroad infringement of protected First Amendment rights. *Id.*; *Broadrick v. Oklahoma*, 413 U.S. at 613.

II. EVEN IF PETITIONER'S LETTERHEAD STATEMENT REGARDING NBTA CERTIFICATION IS COMMERCIAL SPEECH, RESPONDENT EXCEEDED CONSTITUTIONAL BOUNDS IN DISCIPLINING PETITIONER IN THIS CASE.

The Court has repeatedly held that commercial speech, like other varieties, is entitled to First Amendment protection. *Virginia State Board of Pharmacy*, 425 U.S. at 770. A State may regulate commercial speech that is neither misleading nor related to an unlawful activity only upon a showing that: (1) the State has a "substantial" interest that it seeks to achieve; (2) the regulation directly advances the asserted interest; and (3) the regulation is no more extensive than necessary to serve that interest. *Central Hudson Gas & Electric Corp. v. Public Services Commission of New York*, 447 U.S. 557, 566 (1980). The ARDC cannot meet the requirements set forth by *Central Hudson* for regulating commercial speech; accordingly, even if Mr. Peel's letterhead statement regarding NBTA certification is considered commercial speech, the ARDC's attempt to censure Mr. Peel for disseminating that speech violates Mr. Peel's rights under the First and Fourteenth Amendments.

A. Petitioner's Letterhead Was Neither Misleading nor Related to an Unlawful Activity.

The Court has recognized the right of States to prohibit entirely misleading commercial speech, *In the Matter of R.M.J.*, 455 U.S. 191, 203 (1981); as well as commercial speech related to an unlawful activity. *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 326, 345 (1986). However, the ARDC makes no claim that Mr. Peel's letterhead was related to an unlawful activity, and it introduced no evidence that the letterhead was misleading or that anyone had been misled thereby. The Illinois Supreme Court acknowledged the absence of such evidence. 534 N.E.2d at 984.

That would be the end of the matter, except that the Illinois Supreme Court actually made a finding that the letterhead was "misleading." The Illinois Supreme Court listed two bases for that finding: (1) because the letterhead statement regarding NBTA certification was juxtaposed with a truthful statement that Mr. Peel was licensed to practice law in Illinois, Missouri, and Arizona, the general public "*could* be misled to believe that [Mr. Peel] may practice in the field of trial advocacy solely because he is certified by the NBTA"; and (2) the letterhead statement regarding NBTA certification is misleading "because it tacitly attests to the qualifications of [Mr. Peel] as a civil trial advocate." 534 N.E.2d at 984 (emphasis added).

Neither of those bases supports a finding that the letterhead may be prohibited entirely because it is misleading. The potential for confusion between NBTA certification and State licensure is just that: potential. The ARDC has introduced no evidence that anyone was

actually confused by Mr. Peel's letterhead or that anyone was misled into believing that NBTA certification was a prerequisite for practicing law in the field of trial advocacy. Nor did the Illinois Supreme Court find that a natural reading of Mr. Peel's letterhead would lead one to conclude that Mr. Peel claimed a right to engage in trial advocacy solely on the basis of his NBTA certification;[5] the court merely found that one reading the letterhead "could" be misled in that fashion. This Court has granted States unlimited authority to prohibit commercial speech *only* when the speech is found to be actually misleading, not when a State merely finds that speech "could" be misleading. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 641 (1985); *In the Matter of R.M.J.*, 455 U.S. at 203. Moreover, the Court has made clear that States may not prohibit commercial speech on the basis of "unsupported assertions" that the speech is misleading. *Zauderer*, 471 U.S. at 648. In the absence of any record evidence, the Illinois Supreme Court's finding that Mr. Peel's letterhead misled readers into believing that NBTA certification permitted him to engage in trial advocacy is just such an unsupported assertion.

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[5] The actual language of the letterhead would make any such a finding untenable. The letterhead stated that Mr. Peel was licensed by the States of Illinois, Missouri, and Arizona, thereby conveying to readers the correct impression that authorization to practice law is handled at the state-government level. Consequently, the use of the word "National" in the name of "National Board of Trial Advocacy" puts readers on notice that the NBTA operates independently of official state-government attorney licensing organizations.

The other basis for the Illinois Supreme Court's "misleading" finding was its assertion that the letterhead "tacitly attests to the qualifications of the respondent as a civil trial advocate." 534 N.E.2d at 984. The Illinois Supreme Court is correct that Mr. Peel's claim regarding NBTA certification is a claim as to the quality of his legal services. But there is no evidence that Mr. Peel's claim is untruthful or misleading. The ARDC has introduced no evidence that Mr. Peel is not the experienced trial advocate attested to by his NBTA certification. The ARDC appears to be trying to preserve the fiction that all attorneys licensed by the State of Illinois are of equal competence and experience. But as the Supreme Court of Alabama noted in upholding the constitutional right of a lawyer to advertise his NBTA certification, "It would be less than realistic for us to take the position that all lawyers, in fact, possess equal experience, knowledge, and skills with regard to any given of legal practice." *Ex Parte Howell*, 487 So.2d 848, 851 (Ala. 1986).[6]

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[6] Alabama and Minnesota are the only States other than Illinois whose highest courts have ruled on whether the First Amendment entitles an attorney to advertise his NBTA certification; both courts held that attorneys were so entitled. *Ex Parte Howell*; *Johnson v. Director of Professional Responsibility*, 341 N.W.2d 282 (Minn. 1983). Ironically, in both *Howell* and *Johnson*, the attorneys (unlike Mr. Peel) had included the fact of their NBTA certifications in paid advertisements directed to potential clients. The Illinois Supreme Court declined to follow *Howell* and *Johnson*, despite the fact that Mr. Peel's "advertisement" consisted of mentioning his NBTA certification in letterhead that was never sent to potential clients.

This Court has recognized that States may regulate claims by attorneys regarding the quality of their legal practice because such claims have the *potential* for being misleading. *In the Matter of R.M.J.*, 455 U.S. at 203; *Zauderer*, 471 U.S. at 640 n.9. But the Court has never permitted a State to label such claims "misleading" and thereby prohibit all such claims without having to justify its conduct under the standards set forth in *Central Hudson*.

In summary, there is no support for the Illinois Supreme Court's finding that Mr. Peel's letterhead was "misleading" and therefore subject to outright prohibition. Accordingly, if the ARDC seeks to restrict the contents of Mr. Peel's letterhead, it must justify its conduct under the standards set forth in *Central Hudson*. As set forth below, those standards indicate that the State of Illinois violated Mr. Peel's constitutional rights in disciplining him under the facts of this case.

B. Respondent Has Failed To Show a Substantial Interest in Regulating the Content of Petitioner's Letterhead.

A State may not restrict commercial speech that is not misleading and does not propose an illegal transaction unless it first demonstrates a "substantial" interest to be achieved by its restriction. *Central Hudson*, 447 U.S. at 566. The ARDC has not and could not demonstrate a substantial interest in restricting the content of Mr. Peel's letterhead. Accordingly, its censure of Mr. Peel based on the contents of his letterhead violates his First and Fourteenth Amendment rights.

The ARDC unquestionably has a substantial interest in ensuring that representations made by attorneys to *potential clients* regarding the quality of the attorneys' legal services are substantially correct. The ARDC may legitimately be concerned that potential clients not be misled by inaccurate claims as to quality or as to the results likely to be achieved by the attorney. *See In the Matter of R.M.J.*, 455 U.S. at 203; *Zauderer*, 471 U.S. at 640 n.9. But a State's interest in regulating the content of attorney letterhead not sent to potential clients is *de minimus*. Fellow attorneys -- who are familiar with attorney licensing procedures and know which qualifications are important -- are very unlikely to be deceived by any potential misrepresentations contained in the letterhead. Existing clients by definition have already made the decision to be represented by the attorney and thus are unlikely to be affected by any potentially misleading information contained in the letterhead. Moreover, fellow attorneys and existing clients will receive enough information about the attorney from sources other than the letterhead (*e.g.*, the body of the letter attached to the letterhead) that potentially misleading information in the letterhead is unlikely to have a significant effect on those groups.

A finding that the ARDC's interest in regulating the content of attorney letterhead not sent to potential clients is *substantial* would virtually write out the "substantial interest" requirement from the requirements set forth by *Central Hudson*. Whatever interest the ARDC may have in regulating the content of attorney letterhead not sent to potential clients is sufficiently small that it cannot justify the ARDC's actions in abridging Mr. Peel's right to compose his attorney letterhead as he sees fit.

C. Respondent's Restriction on Mr. Peel's Letterhead Is Not Designed Carefully to Achieve its Goal of Preventing Deception.

Even if the ARDC could show that it had a "substantial interest" in regulating the content of Mr. Peel's letterhead, it may not do so constitutionally unless the regulation is "designed carefully" to achieve the State's substantial interest. *Central Hudson*, 447 U.S. at 564. The "designed carefully" test consists of two requirements: the regulation must "directly advance[]" the asserted government interest, and it must not be more extensive than necessary to serve that interest. *Id.*

The ARDC meets neither of those requirements. First, a ban on all claims as to quality in attorney letterhead does not "directly advance" Illinois' asserted interests in preventing consumers from being misled as to the quality of lawyers in the State and in thereby preventing them from making poor choices when retaining attorneys. For one thing, Mr. Peel's letterhead is never sent to potential clients. Moreover, the result of the ARDC's ban is to deprive consumers of *all* information regarding the quality of licensed lawyers in Illinois; therefore, consumers are no more able to choose competent attorneys than if they based their choice on misleading information in letterheads. This Court has repeatedly recognized the value to consumers of the free flow of commercial information and has held that the First Amendment protects that free flow against States' claims that the public is better off being deprived of information. *Shapero v. Kentucky Bar Association*, 108 S.Ct. 1916, 1922 (1988); *Bates v. State Bar of Arizona*, 433 U.S. 350, 374-75 (1977) ("we view as dubious any justification that is based on the benefits of public ignorance"); *Virginia State Board of*

Pharmacy, 425 U.S. at 769-70 ("[i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us").[7]

Second, a total ban on all claims as to quality in attorney letterhead is more extensive than is necessary to serve the ARDC's interests. *See Board of Trustees of State University of New York*, 109 S.Ct. at 3035 (restriction on commercial speech must be "narrowly tailored" to achieve the State's interest). In banning all representations by attorneys as to the quality of their work, the Illinois Supreme Court has elected to ignore the experiences of other States which have chosen to protect consumers against potentially misleading claims as to attorney quality in far less restrictive ways. For example, in *Ex Parte Howell*, 487 So.2d at 851, the

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[7] In *Virginia State Board of Pharmacy*, the Court endorsed advertising by professionals regarding the quality of their work. In responding to arguments that permitting price advertising by pharmacists would demean the profession by permitting low-cost, low-quality businesses to drive the "professional" pharmacist out of business, the Court said, "If [the channels of communication] are truly open, nothing prevents the 'professional' pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer." *Id.* at 770. While the ARDC may have some interest in regulating attorney advertising relating to quality, the ARDC's total ban on such advertising deprives consumers of important information and prevents high-quality attorneys from competing effectively with less qualified attorneys who advertise their services on the basis of price.

Alabama Supreme Court directed the Alabam.. Bar Association to:

> [F]ormulate a proposed rule and a method for approving certifying organizations such as the NBTA before allowing the certifications to be advertised. Such a procedure, in combination with the existing requirement of review by the Bar Association of all legal advertisements ..., will reduce the possibility of spurious certifying organizations being used to mislead the public.

See also Johnson v. Director of Professional Responsibility, 341 N.W.2d at 285 (Minnesota Supreme Court vacates disciplinary action against attorney who advertised his NBTA affiliation, in the absence of "rules describing what specialty designations will be accepted and how to get that designation").

This Court repeatedly has struck down State blanket prohibitions on commercial speech by lawyers where less sweeping regulations would have fully protected the interests sought to be preserved by the State. *See Shapero v. Kentucky Bar Association*, 108 S.Ct. at 1923 ("merely because targeted, direct-mail solicitation presents lawyers with opportunity for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech"); *Zauderer*, 471 U.S. at 644, 646-47, 649 (striking down ban on accepting employment derived from unsolicited legal advice and ban on illustrations in advertisements; "State's argument that it may apply a prophylactic rule to punish appellant notwithstanding that his particular advertisement has none of the vices that allegedly justify the rule is in tension with our insistence that restrictions involving

commercial speech that is not itself deceptive be narrowly crafted to serve the State's purposes"); *In the Matter of R.M.J.*, 455 U.S. at 206 (striking down absolute ban on sending cards announcing opening of office to potential clients; ban is too restrictive because "[t]here is no indication of a failed effort to proceed along a less restrictive path").

The ARDC has not attempted to regulate attorney advertising regarding quality by less restrictive means. To the contrary, the Illinois Supreme Court has turned First Amendment law on its head by holding that it could ban all claims of specialization by attorneys *precisely because* Illinois has no procedure in place for certifying legal specialties. 534 N.E.2d at 986 ("[t]his State has not provided any procedure for formal recognition of specialists in the practice of law. Therefore, the use of the information on [Mr. Peel's] letterhead stating that he is certified as a trial specialist by the National Board of Trial Advocacy is misleading"). The Illinois Supreme Court's recognition that adoption of procedures for certifying attorney specialties is a feasible method of addressing its concerns (regarding potentially misleading attorney advertising relating to quality) is a recognition that its concerns can be addressed by a means far less restrictive than total prohibition. In light of Illinois' failure to make any effort to more narrowly tailor its regulation to address its legitimate concerns regarding misleading advertising, its outright prohibition of all attorney advertising relating to quality and its censure of Mr. Peel for allegedly violating that ban cannot stand. *In the Matter of R.M.J.*, 455 U.S. at 206.

D. Due Process Prohibits Respondent from Disciplining Petitioner Based on Failure to Include Disclaimer.

While the precise rationale for the Illinois Supreme Court's decision to censure Mr. Peel is not altogether clear, the rationale may have been in part that Mr. Peel violated Rule 2-105(a)(3) by failing to include in his letterhead a disclaimer of State sponsorship of the NBTA certification. *See* 534 N.E.2d at 984.

Illinois may well be within its rights in imposing such a disclaimer requirement on attorneys holding themselves out as NBTA-certified. *See Zauderer*, 471 U.S. at 654 n.15. However, due process requires that Mr. Peel not be disciplined for failure to include in his letterhead a disclaimer of State sponsorship without being given advance warning of the disclaimer requirement. *Id.* Accordingly, any attempts by the Illinois Supreme Court to censure Mr. Peel in this proceeding based on failure to disclaim State sponsorship of the NBTA certification is a violation of Mr. Peel's due process rights under the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the decision of the Illinois Supreme Court on the grounds that the discipline imposed upon Petitioner violated his rights to free speech guaranteed by the First and Fourteenth Amendments.

Respectfully submitted,

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September 2, 1989

(3)

No. 88-1775

In The

Supreme Court of the United States

October Term, 1988

GARY E. PEEL,

Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AMICUS CURIAE OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA AMERICAN BOARD OF PROFESSIONAL LIABILITY ATTORNEYS NATIONAL ASSOCIATION OF WOMEN LAWYERS NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS NATIONAL DISTRICT ATTORNEYS ASSOCIATION

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Pursuant to Rule 42 of the Rules of this Court, applicants respectfully move this Court for leave to file the accompanying brief as amici curiae in support of the Petitioner in this case. Respondent, through counsel, has denied consent to the filing of this brief.

Applicants are voluntary national associations of practicing attorneys whose goals include the advancement of the administration of justice by fostering the availability

of legal representation to those in need of legal services. A key to this goal is the consumer's access to information that will enable him or her to make an informed decision concerning legal representation.

Individual applicants are identified in greater detail in the accompanying brief. Of greatest significance to this Court's decision on this motion is the fact that applicants are sponsors of the National Board of Trial Advocacy, whose certification of trial specialists is at the heart of this case.

As sponsors of NBTA, applicants have a substantial stake in this Court's resolution of this case. Moreover, applicants believe that their brief in this case will be of assistance to this Court. Applicants are especially concerned that a decision to uphold the censure of Petitioner will also deprive injured victims and other plaintiffs of information they need to make a fully informed decision in retaining legal representation.

For these reasons, applicants respectfully move the Court for leave to file the accompanying brief in this case as amici curiae.

Respectfully submitted,

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AMERICAN BOARD OF PROFESSIONAL LIABILITY ATTORNEYS
NATIONAL ASSOCIATION OF WOMEN LAWYERS
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
NATIONAL DISTRICT ATTORNEYS ASSOCIATION

INTEREST OF AMICI CURIAE

The Association of Trial Lawyers of America and other named trial lawyer associations respectfully submit this brief as amici curiae in support of attorney-petitioner Peel and to assist this Court in the resolution of an issue of great import to the bar and the general public. A motion for leave to file this brief has been filed with this Court.

Amici are independent voluntary bar associations who are sponsors of the National Board of Trial Advocacy.

The Association of Trial Lawyers of America is an association of over 60,000 attorneys who are engaged primarily in representing the victims of tortious misconduct and in representing criminal defendants. ATLA's sponsorship of NBTA springs from a conviction that competent trial advocacy demands a high degree of knowledge, skill, and experience and that persons in need of legal representation are entitled to objective information regarding an attorney's qualifications as a trial advocate.

The American Board of Professional Liability Attorneys is a highly selective national organization of approximately 350 trial attorney specialists with expertise and experience in professional negligence and product liability litigation.

The National Association of Criminal Defense Lawyers consists of 5,000 members and is the only national bar organization working on behalf of public and private criminal defense attorneys.

The National Association of Women Lawyers, founded in 1899, includes in its membership private practitioners, prosecutors, public defenders, trial and

bar organization working on behalf of public and private criminal defense attorneys.

The National Association of Women Lawyers, founded in 1899, includes in its membership private practitioners, prosecutors, public defenders, trial and

appellate judges, law professors and law students.

The National District Attorneys Association, the sole national organization representing local prosecutors in the U.S., was founded in 1950 to reform the criminal justice system for the benefit of all citizens.

These diverse organizations have long shared a concern that the lack of objective information regarding the qualifications of attorneys is a barrier to persons seeking representation and inhibits access to justice. Acting upon this conviction, they have co-sponsored the National Board of Trial Advocacy, whose purposes are to improve the quality of the trial bar by creating rigorous standards for certification and to improve the delivery of legal services by providing the public with an objective, verifiable indicator of experience, ability, and concentration in trial advocacy.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE RIGHT OF CONSUMERS TO TRUTHFUL INFORMATION THAT AN ATTORNEY HAS BEEN CERTIFIED AS A CIVIL TRIAL SPECIALIST BY THE NATIONAL BOARD OF TRIAL ADVOCACY.

A. THE FIRST AMENDMENT GUARANTEES PUBLIC ACCESS TO INFORMATION CONCERNING LEGAL SERVICES.

This Court established the First Amendment protection of commercial speech upon a clear principle:

> that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 769-70 (1976). Indeed, commercial speech performs such "an indispensable role in the allocation of resources in a free enterprise system" and so "serves individual and societal interests in assuring informed and reliable decisionmaking," that the free flow of such information is worthy of constitutional protection, albeit less protection than noncommercial speech. *Bates v. State Bar of Arizona,* 433 U.S. 350, 365 (1977). This Court made clear in *Bates* that this principle extends to decisionmaking in the choice of legal representation:

> Advertising does not provide a complete foundation on which to select an attorney. But it seems peculiar to deny the consumer, on the ground that the information is

> incomplete, at least some of the relevant information needed to reach an informed decision. . . . We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance.

433 U.S. 350, 375-76 (1977).

In this case, the Court again takes up the task of removing such outmoded and paternalistic barriers. At issue also is the fate of a program sponsored by a broadly representative segment of the trial bar which is designed to provide the public with precisely the type of information that would assist in making an informed and reliable decision in selecting a trial attorney.

1. The First Amendment Commercial Speech Doctrine Protects the Public's Right to Information Material to the Selection of an Attorney.

The National Board of Trial Advocacy [hereinafter "NBTA"] recognizes as specialists in trial advocacy those attorneys who meet a rigorous set of standards, including substantial experience in trial advocacy, continuing legal education, disclosure of any professional disciplinary proceedings, and passing an extensive written examination.[1] Attorney Gary Peel, having satisfied all of the program requirements, included the following truthful statement on his business letterhead in the manner prescribed by NBTA: "Certified Civil Trial Specialist By the National Board of Trial Advocacy."

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[1]The extensive NBTA certification requirements are set forth in detail in the Brief of Amicus Curiae National Board of Trial Advocacy.

The Attorney Registration and Disciplinary Commission of Illinois ["ARDC"] recommended that Peel be censured for violation of Illinois Code of Professional Responsibility Rule 2-105(3). That Rule provides, in pertinent part, "no lawyer may hold himself out as 'certified' or a 'specialist.'" The Illinois Supreme Court imposed the sanction of censure on Peel, holding that Peel's statement was misleading, and therefore not protected by the First Amendment. 126 Ill. 2d 397, 534 N.W.2d 980 (1989).

Amici contend that the Illinois court erred in imposing a blanket ban on commercial speech that is not false or misleading. Fundamentally, in the view of amici, the court failed to recognize that the important First Amendment interest at stake is not "respondent's constitutional right of free speech," 534 N.E.2d at 986. It is rather the public's right to the free flow of information regarding legal services.

2. Information concerning attorney qualifications is vital to an informed selection of an attorney.

Code of Responsibility Rule 105(a)(3) is an artifact from a bygone era. It was an era, in theory at least, of small town lawyers whose character and reputation were well known to potential clients and whose professional dignity held them aloof from crass commercialism. *See generally,* Bowers and Stephens, *Attorney Advertising and the First Amendment: The Development and Impact of a Constitutional Standard,* 17 Memphis St. U.L. Rev. 221 (1987); Christensen, *Advertising By Lawyers,* 1978 Utah L. Rev. 619; Note, *Advertising, Solicitation, and the Profession's Duty to Make Legal Counsel Available,* 81 Yale L.J.1181, 1181-85 (1972). In a more cynical view, it was a time in which established lawyers and their corporate clients

suppressed ethnic immigrant lawyers and their working class clients. J. Auerbach, Unequal Justice 41-50 (1976). Bar authorities exercised unrestrained power to forbid all attorney advertising which, like commercial speech generally, was wholly outside the protection of the First Amendment. *Valentine v. Christensen,* 316 U.S. 52 (1942).

That era ended with the decision in *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748 (1976), striking down a ban on advertising by pharmacists. The Court noted that "the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance." 425 U.S. at 769-70. Any notion that attorney advertising was somehow different from other commercial speech was quickly and definitively rejected by the Court in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977). The Court pointed out that the trends of urbanization and specialization long since have removed the typical practice of law from its small town setting, citing R. Pound, The Lawyer From Antiquity to Modern Times 242 (1953), and that information as to the qualifications of lawyers is simply not available to many. 433 U.S. at 374 n.30. In the Court's view, "the historical foundation for the advertising restraint has crumbled." *Id.* at 350.

Speaking in the context of attorney advertising, the Court has emphasized that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides." *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 652 (1985). As Justice Pearson, of the Washington Supreme Court states, *Virginia Board of Pharmacy* recognized "a public right to receive information." Pearson and O'Neill, *The First Amendment, Commercial Speech, and the Advertising Lawyer,* 9 U. Puget Sound L. Rev. 293, 302 (1986). This notion, that "there

must be not only a freedom to speak but also a freedom to hear," is "grounded in the idea that an individual is constantly confronted with the necessity of making life-affecting decisions and therefore should have available a free flow of information upon which to base those decisions." *Id.* at 303.

The Illinois court in this case gave too little weight to the First Amendment interest of those who need to obtain an attorney to represent them in litigation. That certain attorneys have been recognized as possessing an objective measure of experience and knowledge in the area of trial advocacy is clearly material to making such a selection. In its earliest examination of attorney commercial speech, this Court recognized that the information of utmost value to consumers concerns not only the price of legal services, but also the qualifications of attorneys. The Court noted that a survey conducted by the ABA Special Committee to Survey Legal Needs found that 79% of those questioned agreed with the statement that people do not go to lawyers because they have no way of knowing which lawyers are competent to handle their particular problems. The Court added its own view that, "Although advertising by itself is not adequate to deal with this problem completely, it can provide some of the information that a consumer needs to make an intelligent selection." *Bates v. State Bar of Arizona,* 433 U.S. 350, 371 n.23 (1977).

Empirical studies have proven the Court right. The Federal Trade Commission conducted an extensive investigation of the impact of attorney advertising, which also reviewed the results of other studies. The staff report states:

> The conclusions of this research all point in the same direction. Many people do not consult an attorney, even in situations where they recognize that they may have serious legal problems. . . . The two reasons given most frequently for not consulting an attorney about a legal problem are that attorneys are perceived as charging too much for their services and *that people do not know how to select competent counsel to handle their particular problems.*

Federal Trade Commission Staff Report, "Improving Consumer Access to Legal Services: The Case For Removing Restrictions on Truthful Advertising" 13 (1984) [Emphasis added]. *See also,* Calvani, Langenfeld, and Shuford, *Attorney Advertising and Competition at the Bar,* 41 Vand. L. Rev. 761, 774 n.84 (1988)(noting several studies which found that the factors which consumers identified as important in selecting a lawyer included the area of specialty and the lawyer's past experience).

Amici further submit that when commercial speech serves not only to inform the marketplace, but affects access to justice itself, the constitutional interest in the free flow of information is even greater. As this Court recently announced:

> That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights.

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 644 (1985).

B. CERTIFICATION BY NBTA ASSISTS THE PUBLIC IN MAKING AN INFORMED DECISION REGARDING LEGAL REPRESENTATION.

Seventeen years ago, the Chief Justice of the United States urged the legal profession to "Face up to and reject the notion that every law graduate and every lawyer is qualified, simply by virtue of admission to the bar, to be an advocate in trial courts in matters of serious consequence." Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 Fordham L. Rev. 227, 240 (1973). This was the ground-breaking Sonnett Lecture, in which Chief Justice Burger stated that "some system of certification for trial advocates is an imperative and long overdue step." *Id.* at 227. Indeed, he proposed laying aside work on comprehensive specialty certification "until we have progress in the certification of the one crucial specialty of trial advocacy that is so basic to a fair system of justice." *Id.* at 240.

That proposal became the focus of the deliberations of a conference of judges, scholars and lawyers sponsored by the Roscoe Pound Foundation in 1976. *See,* Trial Advocacy as a Specialty (Final Report of the Annual Chief Justice Earl Warren Conference on Advocacy in the United States, 1976) [hereinafter "Final Report"]. The Conference adopted a set of recommendations that Civil Trial Advocacy and Criminal Trial Advocacy be identified as separate specialties and that "a national bar association may recognize by a certificate those individuals who comply with the standards of specialization . . ." Recommendations IX and X, Final Report, at 23. In a paper presented to the Conference, Prof. James W. McElhaney emphasized: "The certification of trial lawyers as experts in their craft, permitting them to hold

themselves out to the public as specialists, should not rest disproportionately on any single criterion. The profession has the opportunity to require educational standards, testing, peer review, experience, and continuing education." McElhaney, *Lawyers, Law Schools and Legal Institutions: The Dynamics of Implementing the Specialization of Trial Lawyers,* Final Report, 46, 54.

Out of this cauldron of ideas was born the National Board of Trial Advocacy in 1977. Its co-sponsors represent a broad range of trial practitioners who share the twin goals of NBTA to improve the quality of the trial bar by creating rigorous standards for certification and to improve the delivery of legal services by providing the public with an objective, verifiable indicator of experience, ability, and concentration in trial advocacy.

To achieve these goals, NBTA has established an exacting set of standards for certification of trial advocacy specialists. These include substantial litigation experience, disclosure of any professional disciplinary actions, continuing legal education, peer review, passing an extensive written examination, and recertification every five years. A more detailed and precise explanation of these standards is set forth in the brief of NBTA as amicus curiae. Unless we are to be hostage to the "naive assumption" that every law graduate equally qualified for the ultimate confrontation in the courtroom, *See,* Burger, *supra,* at 231, amici submit, certification that an attorney has met these standards would be of assistance to one who seeks a competent trial lawyer.

Amici also urge the Court to be mindful that this decision must often be made in the midst of misfortune. It is the man or woman who has been injured at work or through medical negligence who is suddenly faced with the task of selecting an attorney. It is the family who has lost

a loved one in an auto accident or plane crash. It is the worker without a job because of discrimination or the defrauded small business facing ruin. Under physical and financial stress, these people must select an attorney to evaluate, prepare, and, perhaps, litigate their claims, the resolution of which may affect their lives profoundly.[2] A rule that hides the fact that certain attorneys possess an objective measure of knowledge and experience in civil litigation victimizes them yet again.[3]

II. A BLANKET PROHIBITION ON ATTORNEYS' USE OF "CERTIFIED" AND "SPECIALIST" IN COMMERCIAL SPEECH IS UNCONSTITUTIONAL AS APPLIED TO NBTA CERTIFICATION OF TRIAL ADVOCACY SPECIALISTS.

A. THE ILLINOIS COURT ERRED IN IMPOSING A BLANKET PROHIBITION ON TRUTHFUL SPEECH THAT IS NOT INHERENTLY MISLEADING.

In this case, the Court revisits well-trod territory.

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[2]Amici do not overlook the fact that government, corporations, the insurance industry, and defense law firms employ large numbers of litigation attorneys and may find NBTA certification useful in making hiring decisions. The lower court's decision does not affect their access to information. Those seeking redress of their legal rights, whose counsel may be opposing such entities in the courtroom, are deprived of that information. Thus the decision of the Illinois court has the perverse effect of comforting the comfortable, while afflicting the afflicted.

[3]Persons accused of crimes, of course, also face the problem of locating competent counsel. NBTA operates a separate program which culminates in certifying Criminal Trial Specialists. While the validity of disclosing that certification is not directly at issue in this case, presumably Rule 105(a)(3) prevents such disclosure.

> The First Amendment principles governing state regulation of lawyer solicitations for pecuniary gain are by now familiar: "Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Zauderer [v. Office of Disciplinary Counsel,* 471 U.S. 626 (1985)] at 638 (citing *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York,* 447 U.S. 557, 566 (1980)). Since state regulation of commercial speech "may extend only as far as the interest it serves," *Central Hudson, supra,* at 565, state rules that are designed to prevent the "potential for deception and confusion . . . may be no broader than reasonably necessary to prevent the" perceived evil. *In re R.M.J.,* 455 U.S. 191, 203 (1982).

Shapero v. Kentucky Bar Assn., ___ U.S. ___, 108 S.Ct. 1916, 1921 (1988).

The sole reason advanced by the Illinois court for holding that the First Amendment does not protect Peel's disclosure of NBTA certification was that the statement was "misleading." This Court has addressed this issue with precision:

> Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising

suggests that it is *inherently* misleading or when experience has proved that *in fact* such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States *may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information may be presented in a way that is not deceptive.* Thus, the Court in *Bates* suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation. 433 U.S., at 375, 97 S. Ct., at 2704. Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.

In re R.M.J., 455 U.S.191, 203-04 (1982)(Emphasis added).

Under these principles, this Court has never upheld a blanket prohibition on communicating certain types of information in written or printed advertisements. *See, Bates v. State Bar of Arizona,* 433 U.S. 350 (1977)(striking down ban on price advertising); *In re R.M.J.*, 455 U.S. 191 (1982)(ban on non-approved listing of areas of practice and jurisdictions in which attorney is licensed); *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626 (1985)(ban on illustrations and information concerning specific legal problems); *Shapero v. Kentucky Bar Assn.*, ___ U.S. ___, 108 S.Ct. 1916 (1988)(ban on targeted direct mail addressing specific legal problem). Indeed, this Court has viewed the blanket bans in those cases as "substantially excessive, disregarding 'far less restrictive and more precise means.'" *Board of Trustees of the State University v. Fox,* ___ U.S. ___, 109 S.Ct. 3028, 3034 (1989).

Two state supreme courts have addressed the identical issue that is presented in this case. In *Johnson v. Director of Professional Responsibility,* 341 N.W.2d 282 (Minn. 1983), the director admonished attorney Johnson for advertising his NBTA certification as a civil trial specialist. The director relied upon Minnesota Code of Professional Responsibility Rule 2-105(B), which provided: "A lawyer shall not hold out himself or his firm as a specialist unless or until the Minnesota Supreme Court adopts or authorizes rules or regulations permitting him to do so." The Court took special cognizance of the fact that "NBTA applies a rigorous and exacting set of standards and examinations on a national scale before certifying a lawyer as a trial specialist, either criminal or civil or both." 341 N.W.2d at 283. The court upheld the finding by the disciplinary panel that the advertisement was not misleading or deceptive. After an extensive review of *In re R.M.J.*, 455 U.S. 191 (1982), particularly the guideline that the preferred remedy is more disclosure rather than less, the Minnesota Court held that the "blanket prohibition on all commercial speech regarding specialization" in Rule 2-105(B) was unconstitutional under the First Amendment. 341 N.W.2d at 285.

More recently, an attorney petitioned the Supreme Court of Alabama for a writ of mandamus to the state bar to permit lawyers to advertise that they have been certified as civil trial specialists by NBTA. *Ex Parte Howell,* 487 So. 2d 848 (Ala. 1986). The state bar argued that the advertisement violated the state's Rule 2-104 that "A lawyer shall not state or imply that the lawyer is a specialist . . . " and was inherently misleading. The court found that "Howell's proposed advertisement of certification by the NBTA as a civil trial advocate would not be misleading or deceptive on its face." 487 So. 2d at 851. Applying the principles set out in *In Re R.M.J.*, 455

U.S. 191 (1982), the Alabama court conditionally granted the writ, directing the state bar "to formulate a proposed rule and method for approving organizations such as NBTA before allowing the certifications to be advertised." 487 So. 2d at 851.

In this case, there was no contention that Peel's statement was untruthful; nor was there any evidence that experience had shown it to be misleading in fact. A blanket ban on the use of the words "certified" and "specialist" could be imposed, consistent with this Court's decisions, only upon a finding that they are *inherently* misleading.

The Illinois court, amici argue, made no such finding. The court stated only that the terms were "misleading" for two reasons. First, due to the similarity between the words "certified" and "licensed," "the general public *could be misled* to believe that the respondent may practice in the field of trial advocacy solely because he is certified by the NBTA." 534 N.E.2d at 984. (Emphasis added.) Secondly, the statement "tacitly attests to the qualifications of the respondent as a civil trial advocate." *Id.* At best, the court's own finding is that the statement is only potentially misleading.

Thus, even if this Court were to accept the purported dangers of public confusion posed by Peel's statement, the blanket prohibition represented by Rule 2-105 may not stand. This Court has clearly stated that the possibility of misinterpretation by the public is not sufficient grounds for banning such speech entirely.

> Our recent decisions involving commercial speech have been grounded in the faith that the free flow of information is valuable enough to justify imposing on would-be

> regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.

Zauderer v. Office of Disciplinary Counsel, 471 .U.S. 626, 645 (1985).

The bar itself bears an affirmative responsibility to minimize potential misunderstanding by means of greater information, not less.

> If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.

Bates v. State Bar of Arizona, 433 U.S. 350, 376 (1977).

Because neither the court nor the ARDC made a finding that the statement is inherently misleading or showed that it is misleading in fact, the absolute ban on disclosing NBTA certification as a civil trial specialist is violative of the First Amendment.

B. THE STATEMENT OF NBTA CERTIFICATION IS NOT POTENTIALLY MISLEADING.

Amici further submit that the Illinois court's finding that Peel's statement was misleading was clearly erroneous as a factual matter.

The lower court set forth its finding in detail:

The deception and confusion is particularly

apparent for two reasons. First, the claim of certification by the NBTA impinges upon the sole authority of this court to license attorneys in this State and is misleading because of the similarity between the words "licensed" and "certified." Webster's dictionary defines "certificate" as "a document containing a certified and usually official statement * * * , especially: a document issued by * * * a state agency * * * certifying that one has satisfactorily * * * attained professional standing in a given field *and may officially practice or hold a position in that field.*" (Emphasis added.) (Webster's Third New International Dictionary 366 (1986).) A "license" is defined by Webster's as "a right or permission granted *** by a competent authority to engage in a business or occupation * * * or to engage in some transaction which *but for such license would be unlawful.*" (Emphasis added.) (Webster's Third New International Dictionary 1304 (1986).) Indeed it is apparent from the foregoing that the general public could be misled to believe that the respondent may practice in the field of trial advocacy solely because he is certified by the NBTA. In respondent's letterhead, which we have set out above, directly below the statement concerning certification is the following: "Licensed: Illinois, Missouri, Arizona." The letterhead contains no indication that the licensure was by official organizations which had authority to license, whereas the certification was by an unofficial group and was a purely voluntary matter.

Additionally, the claim that the

> respondent is certified as a civil trial specialist by the NBTA is misleading because it tacitly attests to the qualifications of the respondent as a civil trial advocate. Because not all attorneys licensed to practice law in Illinois are certified by the NBTA, the assertion is tantamount to a claim of superiority by those attorneys who are certified.

543 N.W.2d at 984.

Every communication carries the possibility of misunderstanding. As this Court has recognized: "Condemned to the use of words, we can never expect mathematical certainty in our language." *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972). With respect to the statement at issue here, however, amici submit that the possibilities of "deception and confusion" discerned by the lower court are too speculative and remote to outweigh the public's First Amendment right to receive the information.

The court found the statement "Certified Civil Trial Specialist by the National Board of Trial Advocacy" misleading for two reasons.[4] Amici suggest that both findings were clearly erroneous.

1. The term "certified" is not misleading or deceptive.

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[4]The court's findings are also inconsistent with each other. "Certified" is misleading, in the court's view, because the public will equate that term with "licensed." The second finding, that the statement is "tantamount to a claim of superiority" to other licensed attorneys, assumes that the public recognizes NBTA certification as a qualification beyond licensure.

The Illinois court found that the public "could be misled" due to the similarity between "certified" and "licensed." The court's sole basis for this finding is a redacted quotation from Webster's dictionary which appears to define "certificate" as a document issued by a state agency. Without explanation, however, the court replaced with ellipses those portions of the definition that might apply to NBTA certification. A member of the public who resorted to the dictionary would find the following included in the definition of certificate (underlining those portions omitted by the Illinois court):

> especially: a document issued by a school, a state agency, or a professional organization certifying that one has satisfactorily completed a course of studies, passed a qualifying examination, or has attained professional standing in a given field . . .

Webster's Third New International Dictionary 366 (1986).

The full definition simply does not support the assumption that the public will equate certification with the license to practice law issued by the court. Indeed, because a certificate might issue from governmental or private sources, the only potential for ambiguity arises where the certifying authority is not identified or bears a misleading name. In this case, the statement clearly identified the certifier as the National Board of Trial Advocacy, a name that could not reasonably be confused with the Supreme Court of Illinois.

Further, Peel's letterhead also included the statement "Licensed: Illinois, Missouri, Arizona," removing any possible conjecture that NBTA certification itself was a license to practice. Significantly, it is *this* statement that the court found incomplete for failing to indicate that the

licensures were by official organizations.

Amici also suggest that the court identified no significant harm that might befall the potential client who, unreasonably, confuses NBTA certification with license to practice in Illinois. Since NBTA requires all applicants to be members in good standing of the state bar, there is no possibility that the statement of certification could mislead an individual to retain an attorney who is not licensed. Moreover, the court possesses broad powers to punish those who engage in the unauthorized practice of law.

2. A Statement of NBTA Certification is Not Misleading as a Claim as to the Quality of Legal Services.

The lower court also erred in its second finding, that Peel's letterhead statement "is misleading because it tacitly attests to the qualifications of the respondent as a civil trial advocate." 534 N.W.2d at 984. The court seized upon this Court's dictum that claims as to quality "might be so likely to mislead as to warrant restriction." *Id.*, citing *In re R.M.J.*, 455 U.S. 191, 201 (1982). This Court has made it clear, however, that its concern was with the type of claims that consumers cannot verify:

> Although our decisions have left open the possibility that States may prevent attorneys from making nonverifiable claims regarding the quality of their services, . . . they do not permit a State to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas.

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 640 n.9 (1985)(citations omitted).

NBTA certification is an objective, verifiable fact. It tells a potential client that the attorney has attained a level of experience and knowledge beyond that reflected by licensure. The lower court stated, "Because not all attorneys licensed to practice in Illinois are certified by the NBTA, the assertion is tantamount to a claim of superiority by those attorneys who are certified." 534 N.E.2d at 984. This is so. But the court does not explain how the statement misleads the public.

The fact is that a large fraction of all lawyers, particularly in larger metropolitan areas, rarely see the inside of a courtroom. People retain counsellors in areas such as tax, contracts, estate planning, and many other fields precisely to avoid potential litigation. Other attorneys have simply not attained the experience of litigating a significant number of civil cases. None, apart from those certified by NBTA, have passed the NBTA examination, peer review, and other requirements. Amici submit that the lower court's premise, that all licensed attorneys are equally qualified to handle civil litigation, is itself misleading to the public.

Reasoning of the Alabama Supreme Court, addressing this precise issue, is persuasive:

> It would be less than realistic for us to take the position that all lawyers, in fact, possess equal experience, knowledge, and skills with regard to any given area of legal practice. Although there is presently no state-sanctioned mechanism for identifying legal specialists, it appears to us that a certification of specialty by the NBTA would indicate a level of expertise with regard to trial advocacy in excess of the level of

> expertise required for admission to the bar generally. We conclude, therefore, that Howell's proposed advertisement of certification by the NBTA as a civil trial advocate would not be misleading or deceptive on its face.

Ex Parte Howell, 487 So. 2d 848, 851 (Ala. 1986).

III. BANNING STATEMENTS OF NBTA CERTIFICATION DOES NOT ADVANCE A SUBSTANTIAL STATE INTEREST.

One further justification of Rule 2-105(a)(3) was advanced by Attorney Moran, arguing as counsel for ARDC:

> [T]he State can still regulate or ban certain types of lawyer advertising if the State is advancing a substantial state interest. . . . In this case, the interest is clearly the Court's interest in having bogus certified certification groups pop up or things that you just sign in correspondence courses, things of that nature, where certification would be meaningless. The Administrator doesn't argue either way about the meaningfulness of a certification by the National Board of Trial Advocacy, but by having a complete ban on saying attorneys are certified or specialists, that is tailoring a substantial State interest that is protecting people from either meaningless or false information by having that ban an entire ban that is the best possible remedy to the situation that is before the Court.

Transcript of Hearing Board proceedings, July 27, 1987, at 49-50, reprinted in Petition at 37a.

Although neither the Hearing Board nor the Illinois Supreme Court alluded to this reasoning, it raises a matter of serious concern to amici as cosponsors of NBTA.

ARDC is correct in stating that the State may regulate commercial speech to advance a state interest. However, as this Court has recently reemphasized:

> [W]e require the government goal to be substantial, and the cost to be carefully calculated. Moreover, since the State bears the burden of justifying its restrictions, see *Zauderer, supra,* at 647, it must affirmatively establish the reasonable fit we require.

Board of Trustees of the State University v. Fox, ___U.S. ___, 109 S. Ct. 3028, 3035 (1989). That "fit" requires the State to employ "a means narrowly tailored to achieve the desired objective." *Id.*

The position of ARDC, that a prophylactic ban on all attorney commercial speech regarding specialist certification serves to prevent bogus certification programs, is similar to that advanced by the State in *Zauderer* to ban the use of legal advice and information in advertising. This Court's response is directly applicable in this case:

> The State's argument that it may apply a prophylactic rule to punish appellant notwithstanding that his particular advertisement has none of the vices that allegedly justify the rule is in tension with our insistence that restrictions involving commercial speech that is not deceptive be

> narrowly crafted to serve the State's purposes. . . .
>
> We need not, however, address the theoretical question whether a prophylactic rule is ever permissible in this area, for we do not believe that the State has presented a convincing case for its argument that the rule before us is necessary to the achievement of a substantial governmental interest.[5]

Zauderer v. Office of Disciplinary Counsel, 471 .U.S. 626, 645 (1985).

Amici acknowledge that protecting the public from being misled by spurious certification programs is a legitimate state interest. Whether it is substantial is open

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[5]Amici are mindful that members of this Court view the Court's recent attorney advertising decisions as ill considered, based on "a defective analogy between professional services and standardized consumer products." *Shapero v. Kentucky Bar Assn.,* 109 S.Ct. 1916, 1928 (1988) (O'Connor, J., dissenting); *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 677 (1985)(O'Connor, J., dissenting). The concern there strongly stated is that the Court has tied the hands of the States in safeguarding the professionalism of attorneys. Of particular concern is that price advertising and unsolicited legal advice to attract clients may place the economic interests of lawyers in conflict with the "exercise of independent professional judgment on behalf of their clients." *Zauderer* at 679. Amici suggest that the disclosure of NBTA certification presents no such threat to professionalism. Indeed, by providing potential clients with an objective, verifiable measure of an attorney's advocacy qualifications, certification may serve to counteract more objectionable advertising.

to question. ARDC did not indicate that any such programs exist in Illinois or anywhere else, and amici are aware of none. Nor is there any indication that they are at all likely to arise in the future.

In any event, there are means far short of an absolute ban to protect the public. These means are not only reasonable and feasible, they are actually employed by other states. The Supreme Court of Minnesota adopted a position of evaluating certifying programs on a case-by-case basis. The court stated that "discipline could be imposed if the particular certification advertised was perfunctorily granted by an organization with few or no standards and there was a finding that the advertising was false, fraudulent, misleading or deceptive." *Johnson v. Director of Professional Responsibility,* 341 N.W.2d 282, 285 (Minn. 1983).

The Alabama Supreme Court directed the state bar

> to formulate a proposed rule and method for approving organizations such as NBTA before allowing the certifications to be advertised. Such a procedure, in combination with the existing requirement of review by the Bar Association of all legal advertisement . . . will reduce the possibility of spurious certifying organizations being used to mislead the public.

Ex Parte Howell, 487 So. 2d 848, 851 (Ala. 1986). The states of Connecticut and Georgia have adopted certification standards which recognize NBTA certification while protecting the public from "meaningless" programs. *See* Amicus Curiae Brief of National Board of Trial Advocacy, at 2. The state of Florida has undertaken a

certification program in cooperation with NBTA. *Id.*

Amici are concerned that a decision permitting a ban on attorney disclosure of NBTA certification will effectively end efforts to improve the calibre of trial advocacy and to provide consumers with the information they need to make an informed decision in retaining trial counsel. Experience indicates that the large start-up costs and relatively high operating expenses associated with meaningful certification programs make individual state programs infeasible in many parts of the country. Lumbard, *Specialty Certification for Lawyers: The National Alternative to the Non-Existent State Programs,* 1981 Women Lawyers J. 23

CONCLUSION

For these reasons, amici urge this Court to reverse the decision by the Illinois Supreme Court and hold Illinois Code of Professional Responsibility Rule 2-105(a) unconstitutional as violative of the First Amendment.

Respectfully submitted,

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Sept. 1, 1989

(9)

No. 88-1775

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GARY E. PEEL,
Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,
Respondent.

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN URGING REVERSAL

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September 1, 1989

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Respondent.

MOTION BY PUBLIC CITIZEN FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* URGING REVERSAL

Pursuant to Rule 36.3 of the Rules of this Court, Public Citizen, a nation-wide consumer advocacy organization with over 50,000 members, moves for leave to file the annexed brief as an *amicus curiae* urging reversal.

Public Citizen seeks leave to file this brief because its members, like most Americans who on occasion need legal assistance, have a direct stake in the outcome of this case. This Court's decision will determine whether an attorney has a First Amendment right to inform the public of his or her area of specialization and to state that the attorney has been certified as a specialist by a nationally-recognized professional association. In light of the increasing specialization among attorneys, and a corresponding need on the part of individuals for a broad array of legal services, Public Citizen's members have a strong interest in being able to identify those members of the bar who possess the skills and qualifications necessary to best handle their particular legal problems. Unless the ruling below is overturned, the

Illinois rule at issue in this case will continue to deny consumers access to truthful information that could be highly important in making the often critical choice of which attorney to employ. Accordingly, Public Citizen seeks leave to file this brief to highlight to the Court a perspective that might not otherwise be presented by the parties, namely, that of consumers of legal services.[1]

Counsel for petitioner Gary E. Peel consented to the filing of this brief. However, counsel for respondent Attorney Registration and Disciplinary Commission of Illinois declined to consent, while indicating that respondent would not file an opposition.

Respectfully submitted,

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September 1, 1989

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[1]Public Citizen, through its attorneys at the Public Citizen Litigation Group, has frequently participated in this Court's lawyer advertising cases. Thus, its attorneys represented the appellant in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and filed *amicus* briefs in *Bates v. State Bar of Arizona*, 433 U.S. 733 (1977), *In re Primus*, 436 U.S. 412 (1978), and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). They also represented the appellee in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and filed an *amicus* brief in *Bigelow v. Virginia*, 421 U.S. 809 (1975).

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Respondent.

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN URGING REVERSAL

INTERESTS OF *AMICUS*

This brief is filed on behalf of Public Citizen, a nation-wide consumer advocacy organization that has over 50,000 members. Public Citizen's members, like most Americans, occasionally need legal assistance. For that reason, they have a direct stake in the outcome of this case, which will determine whether an attorney has a First Amendment right to inform the public of his or her area of specialization and to state that the attorney has been certified as a specialist by a nationally-recognized professional association. In an age of increasing specialization among attorneys, and a corresponding need on the part of individuals for a broad array of legal services, consumers have a strong interest in being able to identify those members of the bar who possess the skills and qualifications necessary to best handle their legal problems. However, the Illinois rule at issue in this case denies consumers access to truthful information that could be highly important in making the determination of which attorney to

employ. Public Citizen has long supported the free flow of information about the cost, nature, and availability of specific legal services because this information significantly benefits consumers and serves the interests protected by the First Amendment. Accordingly, Public Citizen is filing this brief to highlight a perspective that might not otherwise be presented by the parties, namely, that of consumers of legal services.[2]

STATEMENT

The facts giving rise to this proceeding are simple and uncontested. Petitioner Gary E. Peel has been licensed to practice law for over twenty years, and he is admitted to the bars of Illinois, Missouri and Arizona. Pet. App. at 28a. Mr. Peel is a highly experienced trial lawyer, having tried several hundred cases to verdict, and having handled over one thousand cases. Pet. App. at 29a-30a. In 1981, Mr. Peel was certified as a "civil trial specialist" by the National Board of Trial Advocacy ("NBTA"), and he has maintained his certification since then. Pet. App. at 29a.[3] There is no dispute that the NBTA is a

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[2]Public Citizen, through its attorneys at the Public Citizen Litigation Group, has frequently participated in this Court's lawyer advertising cases. Thus, its attorneys represented the appellant in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and filed *amicus* briefs in *Bates v. State Bar of Arizona*, 433 U.S. 733 (1977), *In re Primus*, 436 U.S. 412 (1978), and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). They also represented the appellee in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and filed an *amicus* brief in *Bigelow v. Virginia*, 421 U.S. 809 (1975).

[3]NBTA is sponsored by the American Trial Lawyers Association, the International Society of Barristers, the National Association of Criminal Defense Attorneys, the National Association of Women Lawyers, the American Board of Professional Liability Attorneys, and the National District Attorneys' Association.

nationally-recognized, professional organization founded by a number of bar groups to enhance the quality of legal services to the public. Certification of lawyers possessing substantial and objectively verifiable trial skills is one part of the work of NBTA. Nor is there any dispute that, in order to obtain certification by the NBTA, an attorney must satisfy a number of stringent requirements (described in petitioner's brief, and in *In re Johnson*, 341 N.W.2d 282, 283 (Minn. 1983)), demonstrating his or her experience, proficiency and specialization in trial advocacy. There is also no dispute that petitioner amply satisfied those standards.

The catalyst for this litigation was Mr. Peel's decision in 1983 to place on his letterhead the following statement: "Certified Civil Trial Specialist By The National Board of Trial Advocacy." Apart from Mr. Peel's listing in Martindale-Hubbell, which also notes his certification by NBTA, and his letterhead, Mr. Peel has made no effort to publicize his certification. Pet. App. at 31a. For three years, Mr. Peel used this letterhead in his practice, sending letters to, among others, clients, lawyers and courts. During this period, no complaints were lodged against Mr. Peel by any member of the public, by other lawyers, or by anyone else.

However, in April 1986, in the course of Mr. Peel's representation of two other attorneys before the respondent Attorney Registration and Disciplinary Commission of Illinois ("ARDC"), the Administrator of ARDC noticed the statement on Mr. Peel's letterhead. Acting on his own initiative, the Administrator filed a complaint against Mr. Peel, alleging principally that Mr. Peel's letterhead violated Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility, which provides, with exceptions not relevant here, that "no lawyer may hold himself out as 'certified' or a 'specialist.'"

During the administrative hearing on the complaint, the Administrator of ARDC articulated his theory about why Mr.

Peel's letterhead statement violated Rule 2-105(a)(3) and thus could properly be banned. Recognizing (i) that Mr. Peel's letterhead is indisputably truthful, (ii) that there is no evidence whatsoever that any member of the public or the profession has been misled by it, (iii) that the NBTA is an established professional organization, and (iv) that the information relating to certification by the NBTA would be useful to the public, the Administrator argued that *any* statement regarding specialization or certification is "inherently misleading" and hence can be suppressed consistent with the First Amendment. Even though no evidence was introduced to support his theory, the Administrator took the position that a sweeping, categorical ban on all public statements concerning certification programs is essential as a prophylactic measure, since that is the only way the state can prevent "bogus" groups from conferring undeserved or meaningless certifications. Pet. App. at 37a.

The Hearing Board accepted a variation of this theory. It asserted that, since Illinois had "never recognized or approved any certification process[,]" Mr. Peel's use of the letterhead statement was inherently misleading because it falsely implied that his certification by NBTA was approved or sponsored by the Illinois Supreme Court. Pet. App. at 20a. However, the Board pointed to nothing in the record to support its assumption that a reader of Mr. Peel's letterhead would be misled into believing that the state had somehow approved NBTA's certification process. The Hearing Board recommended that Mr. Peel be publicly censured, and the ARDC's Review Board concurred. Pet. App. at 16a.

The Illinois Supreme Court affirmed. In its opinion, the court found that Mr. Peel had violated Rule 2-105(a)(3) in two respects. To start with, the court held that "the claim of certification by the NBTA impinges upon the sole authority of this court to license attorneys in this State and is misleading because of the similarity between the words 'licensed' and 'certified.'" Pet.

App. at 9a. Thus, the court thought it "apparent . . . that the general public could be misled to believe that the respondent may practice in the field of trial advocacy solely because of his certification by the NBTA." Pet. App. at 9a.[4]

The court also asserted that the statement was misleading because "it tacitly attests to the qualifications of respondent as a civil practice advocate." Pet. App. at 9a. According to the court, the certification statement is "tantamount to a claim of superiority by those attorneys who are certified." Pet. App. at 9a. In so concluding, the court recognized the need to explain the distinction embodied in Illinois Rule 2-105(a)(3) between statements that an attorney "concentrates in" or "limits" his practice to a particular field on the one hand, which are lawful, and statements that the lawyer is a "specialist," or "specializes in" a given area on the other, which are forbidden. In the court's view, the former statements simply convey information regarding the lawyer's area of practice; they pose little threat of misleading the public. But the court found that statements indicating a specialty "have acquired a secondary meaning implying formal recognition as a specialist and use of these terms is misleading, except in States which provide procedures for such certification." Pet. App. at 13a. Because Illinois had not established procedures for certifying specialists, the court held that any statement by Mr. Peel that he had been certified as a trial specialist was misleading and barred by Rule 2-105(a). Accordingly, the court upheld the public censure of Mr. Peel.

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[4]Although the court acknowledged that Mr. Peel's letterhead also contained the separate, equally prominent statement "Licensed: Illinois, Missouri, and Arizona," the court discounted Mr. Peel's effort to draw precisely the line that the court believed important by stating that "[t]he letterhead contains no indication that the licensure was by official organizations that had authority to license, whereas the certification was by an unofficial group and was purely a voluntary matter." Pet. App. at 9a.

ARGUMENT

ILLINOIS' RULE, AS APPLIED TO PROHIBIT A TRUTHFUL, OBJECTIVELY VERIFIABLE STATEMENT REGARDING CERTIFICATION AS A SPECIALIST BY A *BONA FIDE* ORGANIZATION, VIOLATES THE FIRST AMENDMENT.

1. *The Court's Lawyer Advertising Decisions Establish A Broad Right To Disseminate Truthful Information.*

In the twelve years since *Bates v. State Bar of Arizona*, 433 U.S. 733 (1977), this Court has on several occasions attempted to chart the permissible boundaries of state restrictions on communications between attorneys and potential clients. *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *In re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). Despite their divergent facts, these cases all recognize two related concerns that arise whenever a state restricts the dissemination of information about the availability and cost of legal services: (1) that legal rights often go unvindicated out of ignorance of those rights; and (2) that consumers lack vital information about how to obtain the legal services they need at a price that they can afford. Thus, *Bates*, *Primus*, *R.M.J.*, *Zauderer*, and *Shapero* are all based on the understanding that advertising and other communications between lawyers and potential clients can be instrumental in apprising people of their legal rights.[5]

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[5]Like Mr. Peel, we are far from convinced that his letterhead statement constitutes "commercial speech," since it in no way "propose[s] a commercial transaction," which "is the test for identifying commercial speech." *Board of Trustees v. Fox*, 109 S. Ct. 3028, 3031 (1989), *quoting Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976); *see also Riley v. National Federation of the Blind of North Carolina, Inc.*, 108 S. Ct. 2667 (1988). To the contrary, the record in this case establishes that Mr. Peel did not use his letterhead in any effort to attract new clients. Pet. App. at 31a. While there remain unresolved questions as to the "precise bounds of the category of expression that may be termed commercial speech," *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985), the expression at issue here is quite different from the communications at issue in the Court's prior commercial speech cases, which have all involved direct efforts to secure new business. However, in our view, it is not necessary for the Court to resolve the question of how to characterize Mr. Peel's statement because, even applying the less stringent protections offered by the commercial speech doctrine, Mr. Peel's letterhead is plainly protected. Accordingly, we urge the Court to rule that, even if Mr. Peel had advertised his certification — for example, in a newspaper ad seeking employment — Illinois could not forbid him from doing so consistent with the First Amendment.

These cases also address the next step in the process: to what extent may lawyers assist members of the public, through advertising and other communications, in finding a qualified and willing attorney to help them in resolving their particular legal claim. *Bates* teaches that lawyers seeking employment may engage in truthful newspaper advertising of prices for "routine" legal services. *R.M.J.* makes clear that lawyers must be permitted to advertise the areas of law in which they practice, provided that the lawyer's description is not misleading. *Zauderer* affirms the principle that, while states may regulate in-person solicitation by lawyers, non-deceptive advertising designed to attract clients who have specific legal problems is protected by the First Amendment, and it also establishes that a state cannot restrict the use of illustrations in advertising for legal services, unless the state can demonstrate that consumers will be misled. Finally, *Shapero* holds that lawyers can use targeted, direct mail solicitations to reach people thought to need specific legal services. Read together, these cases firmly establish that the First Amendment forbids a state from imposing broad restrictions on attorney

advertising where "less restrictive and more precise means" are available. *Shapero*, 108 S. Ct. at 1923.[6]

2. *Illinois Cannot Bar Truthful, Objectively Verifiable Statements Regarding Specialization or Certification.*

In *amicus'* view, there is no way to reconcile the decision below with the rationale underlying this Court's prior lawyer advertising cases. Mr. Peel seeks to disseminate truthful, objectively verifiable information about his practice and his qualifications. No one denies that it would be relevant to a prospective client looking to retain a skilled trial lawyer that Mr. Peel has been "certified" as a "civil trial specialist" by a nationally recognized organization of his peers.

Nor can it be doubted that the public has a significant interest in learning about an attorney's qualifications. Lawyers are not fungible—they are not equally qualified to handle every type of case. The legal profession now encompasses literally hundreds of specialties and sub-specialties—running the gamut from adoption to zoning. Indeed, these days, to say that a lawyer is a "tax specialist" is too imprecise—the tax system is so complex that there are specialists in corporate, estate, international and individual taxation, no doubt with dozens of sub-specialties within those broad categories. This drive towards lawyer specialization, in turn, reflects the growing intricacies of the present-day legal system. For someone in need of legal representation, it is essential to find an attorney with the right qualifications and skills to provide the best assistance for the particular matter at hand.[7]

[6]While the Court's recent decision in *Board of Trustees v. Fox*, 109 S. Ct. 3028 (1989), suggests that the "least restrictive means" test is no longer required in commercial speech cases, *Fox* alters neither the analysis nor outcome of this case. In *Fox*, the Court made it clear that, in order to justify a restraint on commercial speech, the state still must show that the restraint is "narrowly tailored to achieve the desired objective." *Id.* at 3035. Since, as described more fully below and in petitioner's brief, respondent made no effort at all to tailor its restraint, but instead imposed a categorical ban, the ban cannot survive.

Illinois' disciplinary rule, Rule 2-105(a)(3), recognizes the value of providing the public with information about a lawyer's field of practice. It affirmatively permits a "lawyer or law firm" to "specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice." However, the rule goes on to state that "no lawyer may hold himself out as 'certified' or a 'specialist.'" The justification for Illinois' bright-line distinction, we are told by the ARDC and the Illinois Supreme Court, is that the terms "specialist" and "certified" carry with them a "secondary meaning implying formal recognition as a specialist," as well as an implicit assertion of special

[7]Many firms apparently believe that it is important to inform the public of the areas in which their attorneys practice. In Chicago, for instance, a number of the most prominent firms list in Martindale-Hubbell the area of specialization for each of their attorneys. To illustrate, the Martindale-Hubbell entry for the firm of Hopkins & Sutter shows that its lawyers specialize in: litigation, antitrust, health care, corporate, equipment leasing, saving and loan, fiduciary law, federal taxation, tax-exempt organizations, estate planning, corporate benefits, probate, insurance, acquisitions and venture capital, closely held corporations, municipal finance, and environmental law. Other major firms, including Keck, Mahin & Cate, Kirkland & Ellis, Lord, Bissell & Brook, Sachnoff, Weaver & Rubenstein, and Seyfarth, Shaw, Fairweather & Geraldson, similarly list the fields in which their attorneys concentrate their practices. In addition, most firms routinely list their attorneys' affiliation with major professional organizations. A number of Mayer, Brown & Platt attorneys are listed as "Fellow, American College of Trial Lawyers," as are many lawyers in other firms. While these listings do not purport to *certify* that the lawyer is an expert or specialist in the field of trial practice, it is difficult to imagine why firms would pay to have that information included in their listings unless it is to convey the impression that its attorneys are, in fact, expert trial lawyers.

expertise. Pet. App. at 13a; *see* Respondent's Brief in Opposition to Petition for a Writ of Certiorari, at 31-33. While respondent acknowledges the legitimacy of the NBTA and does not dispute that NBTA's certification is based on reasonable and objective criteria, respondent fears a proliferation of bogus organizations conferring undeserved certifications, which, it asserts, would be difficult to police. Accordingly, respondent claims that the use of the terms "specialist" and "certified" is inherently misleading, and hence the state may impose a categorical ban as a prophylactic measure to prevent the public from being deceived.

The difficulty is that Illinois has done precisely what this Court has repeatedly said states are forbidden from doing — it has imposed an outright ban on a category of speech on the basis of untested, unproven, and fundamentally paternalistic assumptions concerning the ability of the public to understand statements relating to the delivery of legal services. *See Bates*, 433 U.S. at 381; *R.M.J.*, 455 U.S. at 200 n.11; *Zauderer*, 471 U.S. at 644-46. Although Illinois assumes that the public will misunderstand Mr. Peel's letterhead, it is hard to imagine why that is so. Most consumers would read the letterhead as meaning what it says — that a national organization of trial lawyers has "certified" that Mr. Peel is a "specialist" in civil trials. There is simply no room in Mr. Peel's unadorned statement relating to certification to support respondent's concern.

Nor is there any basis for respondent's theory, endorsed by the Illinois Supreme Court, that the public is likely to believe that a certification by the *National* Board of Trial Advocacy is equivalent to a license by an instrumentality of the *Illinois* state government. This is especially so since any conceivable confusion is dispelled by the separate listing on Mr. Peel's letterhead of the states in which he is in fact "licensed" to practice.

Nonetheless, the Illinois Supreme Court found this concern substantial, adopting the argument that the term "specialized" carries with it a "secondary meaning" that the specialist has been

officially approved as such by the state. However, neither the court nor the ARDC pointed to any evidence to support the existence of this secondary meaning, much less its prevalence among lay-people. But it is settled doctrine that a state seeking to uphold a restriction on commercial speech has the burden of justifying it. *Zauderer*, *supra*, 471 U.S. at 647. As the Court emphasized in *Zauderer*, a state cannot base a prophylactic rule on unsupported assertions or unsubstantiated fears; rather it must back up its claim of potential harm with evidence in the record. *Id.* at 644-47; *see also Board of Trustees v. Fox*, *supra*, 109 S. Ct. at 3035. Here, as in *Zauderer*, the "State's arguments amount to little more than unsupported assertions: nowhere does the state cite any evidence or authority of any kind for its contention that the potential abuses [that could flow from statements regarding certification] . . . cannot be combated by any means short of a blanket ban." 471 U.S. at 648-49.

Instead of evidence, the only support cited by the Illinois court is a Draft Report of the American Bar Association Standing Committee on Ethics and Professional Responsibility which simply asserts that the terms "specialist" and "certified" "have acquired a secondary meaning implying formal recognition as a specialist." Pet. App. at 12a-13a. While that may be the tentative view of one ABA Committee, both the United States Department of Justice and the Federal Trade Commission have weighed in on the other side of the debate. In a July 23, 1982 letter signed by Jonathan D. Rose, then Assistant Attorney General in charge of the Office of Legal Policy, the Justice Department addressed an earlier proposal by the ABA Committee that advocated forbidding *all* statements implying that an attorney is certified or a specialist, including statements that the lawyer's practice "is limited to" or "concentrated in" particular fields, because all of these terms have a "secondary meaning." In response, the Justice Department questioned

> whether these terms have acquired any such "secondary meaning" among laymen. On the other hand, this information could be useful to potential clients for legal services. In an effort to exclude subjective claims of expertise, we believe the Rule may unnecessarily preclude valid statements of objective fact. We recommend, therefore, that the rule be limited to prohibiting improper claims of specialization, leaving statements concerning fields of practice to be governed only by the general strictures of proposed Rule 7.1 [prohibiting false, deceptive or misleading statements].

Rose Letter, at 9, Reprinted as Appendix D to Executive Summary, Federal Trade Commission, *Staff Report on Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising* (Nov. 1984) ("*FTC Staff Report*"). The FTC staff expressed the same view, recommending that lawyers be allowed to identify the areas in which they practice, and stressing that the "*only* limitation is that the lawyer shall not state or imply any officially recognized expertise or certification that he or she does not actually possess." *FTC Staff Report*, Executive Summary at 8 (emphasis added).

The distinction drawn by the FTC and Department of Justice is a sensible one that is in keeping with the Court's prior lawyer advertising rulings. Thus, as the Court has repeatedly held, truthful, objectively verifiable information relating to a lawyer's qualifications, fees, or services is protected by the First Amendment and can be suppressed only on a showing — based on record evidence — that it would be misunderstood by the public. Indeed, in *Zauderer*, the Court made clear that while it had left open the question of whether states "may prevent attorneys from making non-verifiable claims regarding the quality of their services," a state could not "prevent an attorney from making accurate statements of fact regarding the nature of his practice

merely because it is possible that some readers will infer that he has some expertise in those areas." *Zauderer, supra*, 471 U.S. at 640 n.9.

In defending Illinois Rule 2-105(a)(3), the Illinois Supreme Court also suggested that there is a difference of constitutional dimension between statements regarding specialization, which are forbidden because they imply expertise, and statements regarding field of concentration, which are permitted. Pet. App. at 13a. There are several reasons why this distinction cannot bear the weight placed on it by the state.

To begin with, from the public's standpoint, it is hard to see any material difference in a lawyer's claim that he "specializes in" or "concentrates in" or "limits" his practice to a particular field. To the contrary, to "specialize" is "to concentrate one's efforts" or "to limit in scope or interest." *Webster's Third New International Dictionary*, at 2186 (1961). It may be, of course, that the public will assume that if a lawyer specializes or concentrates in a given field, he or she has developed expertise in that subject. But if respondent fears that the public may wrongly assume such expertise, that concern applies with equal force to those statements which are *permitted* by Rule 2-105(a)(3), and hence it cannot justify the line that Illinois has drawn.[8]

More importantly, respondent never directly answers the underlying question posed by its rule — namely, why does the public need to be protected from truthful, objective statements which directly bear on an attorney's specialty or certification? While respondent admits that the public has a need for informa-

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[8]In fact, the same ABA Committee on whose report respondent has relied previously proposed a sweeping ban of *any* statements regarding specialization, including statements that an attorney's practice is "limited to" or "concentrated in" a particular field, because these terms had also acquired "a secondary meaning implying recognition as a specialist." *See* Rose Letter, at 9 (citation omitted). This casts further doubt on the rationale Illinois offers to support its rule.

tion that will help in the selection of an attorney, and that information regarding certification by a *bona fide* organization would be relevant to that choice, it refuses to allow the public to obtain this information because of unsubstantiated fears of theoretical abuses.

What is worse, respondent acknowledges that it is sacrificing Mr. Peel's First Amendment right to convey unquestionably truthful information on the altar of administrative convenience. In essence, respondent contends that this Court should countenance the muzzling of truthful speakers like Mr. Peel because policing abuses in the marketplace would be too onerous. This argument, however, has been repeatedly rejected by this Court. Most recently, in *Shapero*, the Court struck down a Kentucky rule prohibiting lawyers from sending "targeted" direct mailings over the state's claim that it would be too difficult to safeguard against abuses. The Court ruled that the state could regulate improper letters "through far less restrictive and more precise means" than a total ban. 108 S. Ct. at 1923. The Court then expressly rejected the state's argument that it would be too burdensome to police against abuse:

> To be sure, a state agency or bar association that reviews solicitation letters might have more work than one that does not. But "[o]ur recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."

Id. at 1924, *quoting Zauderer, supra,* 471 U.S. at 646; *see also Bates, supra,* 433 U.S. at 379 (rejecting state's argument that "wholesale restriction" on lawyer advertising is "justified by the

problems of enforcement if any other course is taken").

Illinois may have decided for the moment that it does not want to sponsor a state certification program — and there may be good reason for that decision. But that fact alone cannot permit the state categorically to ban all speech by attorneys relating to certification by *bona fide* organizations. So long as there are more "narrowly tailored" means for the state to protect against abuse, *cf. Board of Trustees v. Fox, supra,* 109 S. Ct. at 3035, it cannot impose an outright ban like that contained in Rule 2-105(a)(3).

Finally, a reversal here would not leave Illinois powerless to protect the public against false claims of certification, or claims of certification by bogus organizations. Illinois Rule 2-101(b) flatly prohibits false, misleading, or deceptive claims in advertising or publicity. In the alternative, Illinois could follow the lead of Alabama and Minnesota, which, after court decisions affirming the First Amendment rights of attorneys to list their certification by NBTA, established programs to license organizations which certify lawyers as specialists. *See Ex Parte Howell,* 487 So. 2d 848 (Ala. 1986); *In re Johnson,* 341 N.W. 2d 282 (Minn. 1983); *see also* Pet. App. at 5a. Or, if Illinois concluded that additional disclosures were needed to cure any perceived defect, it could require that any attorney listing certification must provide additional explanatory material upon request of a client or prospective client. Whatever course Illinois decides to follow, it would clearly have many options open to it if the Court finds Rule 2-105(a)(3)'s outright ban on statements of specialty or certification unconstitutional.

CONCLUSION

For the reasons stated above, the judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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No. 88-1775

In the Supreme Court of the United States

OCTOBER TERM, 1989

GARY E. PEEL, PETITIONER

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE FEDERAL TRADE COMMISSION AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether an attorney's statement on his business letterhead that he is a "certified civil trial specialist by the National Board of Trial Advocacy" constitutes commercial speech.

2. Whether, if an attorney's truthful certification claim qualifies as commercial speech, the state can, consistent with the First Amendment, forbid it along with all other certification and specialization claims.

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INTEREST OF THE FEDERAL TRADE COMMISSION

The Federal Trade Commission (Commission) enforces Section 5(a) of the Federal Trade Commission Act, which prohibits, inter alia, "unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. 45(a), and other statutes that regulate unfair and deceptive practices in specific industries.[1] Because many of these regulated

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[1] See, *e.g.*, Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.* (prohibiting misleading and harassing communications by debt collectors); Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.* (regulating, among other speech, communications between credit reporting agencies and creditors regarding creditworthiness of consumers).

practices take the form of speech, and because commercial speech is " 'traditionally subject to governmental regulation,' " *Board of Trustees of the State Univ. of N.Y.* v. *Fox,* 109 S. Ct. 3028, 3035 (1989), the Commission's ability to implement its statutory mandate is vitally affected by the scope of the definition of "commercial speech" under the First Amendment.

In addition, in the years since this Court extended First Amendment protection to commercial speech in *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748 (1976), the Commission has worked to improve consumer access to truthful information about professional services by initiating antitrust enforcement proceedings,[2] by conducting studies about the effects of advertising by professionals, including attorneys,[3] and by filing comments with state bar authorities on the regulation of attorney advertising.[4] The Commission accordingly has a

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[2] See, *e.g., Massachusetts Board of Registration in Optometry,* 110 F.T.C. 549 (1988); *Rhode Island Board of Accountancy,* 107 F.T.C. 293 (1986); *Louisiana State Board of Dentistry,* 106 F.T.C. 65 (1985); *Montana Board of Optometrists,* 106 F.T.C. 80 (1985); *Michigan Ass'n of Osteopathic Physicians & Surgeons, Inc.,* 102 F.T.C. 1092 (1983); *American Medical Ass'n,* 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982); *American Dental Ass'n,* 94 F.T.C. 403 (1979), modified, 100 F.T.C. 448 (1982), 101 F.T.C. 34 (1983).

[3] See, *e.g.,* Cleveland Regional Office and Bureau of Economics, FTC, *Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising* (1984).

[4] See, *e.g.,* Comments of the Staff of the Bureau of Competition of the Federal Trade Commission on the American Bar Association Model Rules of Professional Conduct (Nov. 23, 1988); Comments of the Federal Trade Commission Staff on the Rules of Professional Conduct of the New Jersey Supreme Court, submitted to the Committee on Attorney Advertising of the New Jersey Supreme Court (Nov. 9, 1987); Comments of the Federal Trade Commission Staff on the

substantial interest both in preserving the government's authority to regulate commercial speech and in eliminating unnecessary restrictions on the flow of truthful information about professional legal services.

STATEMENT

Petitioner Gary E. Peel is an attorney licensed to practice law in Illinois, Arizona, and Missouri. Pet. App. 19a. In 1981, petitioner became certified as a specialist in civil trial advocacy by the National Board of Trial Advocacy (NBTA). *Id.* at 30a. The NBTA was founded in 1977 to improve the quality of the trial bar and the delivery of legal services by providing a national credentialing process for trial lawyers. See NBTA Amicus Curiae Br. 4. Modeled after the medical profession's specialty certification boards, the NBTA certifies attorneys who meet specified standards of experience, ability, and concentration in trial advocacy.[5]

Code of Professional Responsibility of the Alabama State Bar, submitted to the Supreme Court of Alabama (Mar. 31, 1987).

[5] According to the NBTA, certification as a civil trial specialist requires, among other conditions: (1) at least five years of actual practice in civil trial law during the period immediately preceding application for certification, of which at least thirty percent of professional time is spent in civil trial litigation; (2) participation as lead counsel in fifteen or more complete civil trials to verdict or judgment, including no fewer than 45 full days of trial and at least five jury trials and participation as lead counsel in at least forty additional contested proceedings involving the taking of testimony (*e.g.,* trials, evidentiary hearings, depositions, or motions heard before or after trial); (3) participation in forty-five hours of continuing legal education in the specialty in the three year period preceding application; (4) provision of references by six attorneys not presently partners or associates of the candidate; and (5) successful completion of a day-long written examination. NBTA Amicus Curiae Br. 8-9.

Beginning in 1983, petitioner placed on his letterhead stationery, between his name and the States in which he is licensed to practice, the following statement: "Certified Civil Trial Specialist By the National Board of Trial Advocacy." Pet. App. 21a. On April 15, 1986, petitioner wrote to two clients on that stationery. Those clients—who were attorneys themselves involved in disciplinary proceedings before the respondent, the Administrator of the Attorney Registration and Disciplinary Commission of Illinois (ARDC)—submitted petitioner's letter as an exhibit to their submission to the ARDC in their disciplinary proceedings. Pet. 5. Upon noticing the statement of certification on petitioner's stationery, the Administrator, on April 9, 1987, filed a complaint with the Hearing Board of the ARDC. The complaint alleged, among other infractions,[6] that the certification statement on petitioner's letterhead violated Disciplinary Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility, which provides that "no lawyer may hold himself out as "certified' or a 'specialist.' "[7]

In response to the Administrator's complaint, petitioner asserted that "lawyer specialty advertising constitutes a

[6] The one-count complaint alleged violations of three Disciplinary Rules: (1) Rule 1-102, which proscribes violating a Disciplinary Rule; (2) Rule 2-101(b), which prohibits false, misleading, or deceptive commercial publicity; and (3) Rule 2-105(a), which forbids lawyers other than patent, trademark, and admiralty lawyers from holding themselves out publicly as certified or as a specialist. Pet. App. 17a.

[7] The rule provides that "[a] lawyer shall not hold himself out publicly as a specialist," except for lawyers engaged in the practice of patent, trademark, or admiralty law. The rule permits a lawyer or law firm to "specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice." With those exceptions, however, "no lawyer may hold himself out as 'certified' or a 'specialist.' " Pet. 2-3.

form of commercial free speech, protected by the first amendment." Pet. App. 22a-23a. Besides using his letterhead to correspond with clients, petitioner testified at his disciplinary hearing that he used his letterhead in communications with other attorneys, with the ARDC, and in the ordinary course of his law practice. *Id.* at 26a.

Following the hearing, on August 25, 1987, a panel of the ARDC Hearing Board found that petitioner had held himself out as being "certified" or as a "specialist" in violation of Disciplinary Rule 2-105(a) and recommended that petitioner be censured. Pet. App. 20a. The panel held that petitioner's certification representation was " 'misleading' as our Supreme Court has never recognized or approved any certification process." *Ibid.* On February 12, 1988, the ARDC Review Board "concur[red]" with the hearing panel's decision and its recommendation that petitioner be censured. *Id.* at 16a.

On review, the Supreme Court of Illinois adopted the recommendation of the Review Board and censured petitioner. Pet. App. 15a. The court explained that petitioner's certification claim was "decep[tive] and confus[ing]" for two reasons. Id. at 9a. First, by stating that petitioner was certified by the NBTA, "the general public could be misled to believe that [petitioner] may practice in the field of trial advocacy solely because he is certified by the NBTA." *Ibid.* The fact that the certification claim on petitioner's letterhead was positioned directly above the list of States in which petitioner was licensed to practice law added to the possibility of confusion, because "[t]he letterhead contain[ed] no indication that licensure was by official organizations which had authority to license, whereas the certification was by an unofficial group and was purely a voluntary matter." *Ibid.* For this reason, the court concluded, "the claim of certification by the NBTA

impinge[d] upon the sole authority of this court to license attorneys in this State and [wa]s misleading because of the similarity between the words 'licensed' and 'certified.' " *Ibid.* Second, the court found petitioner's certification statement misleading because it "tacitly attest[ed] to the qualifications of [petitioner] as a civil trial advocate" and was "tantamount to a claim of superiority by those attorneys who are certified [over Illinois-licensed practitioners not so certified]." *Ibid.*

Later in its opinion, the court agreed with the concern of an ABA committee that "the terms 'specialist' or 'practices in a specialty' or 'specializes in' particular fields have acquired a secondary meaning implying formal recognition as a specialist and [that] use of these terms is misleading, except in States which provide procedures for such certification." Pet. App. 13a. The court was particularly concerned because the certification statement "was used on [petitioner's] letterhead in conjunction with information about official licensures in Illinois, Missouri and Arizona." *Ibid.*[8]

[8] In response to petitioner's equal protection claim, the Illinois Supreme Court distinguished between admiralty, patent, and trademark lawyers, who are permitted to advertise themselves as specialists under Disciplinary Rule 2-105, and lawyers engaged in any other type of practice, who are not allowed to advertise themselves as specialists. In the court's view, the distinction rested on the notion that "allowing attorneys practicing in admiralty to advertise their specialties in no way implies that the admiralty attorney is more capable than any other admiralty attorney because all such attorneys may advertise the fact [of their specialization in admiralty law]." Pet. App. 14a. In addition, the court noted that, historically, clients in need of counsel on patent, trademark, and admiralty law found it difficult to locate attorneys engaged in these practice areas; "locating an attorney who is a civil trial advocate would not involve the same difficulty," especially when Rule 2-105 permits them to represent their practices as "limited to" or "concentrated in" a particular area of law. *Ibid.*

SUMMARY OF ARGUMENT

Statements describing the professional qualifications of an attorney on his business letterhead constitute commercial speech. On the present record, the State's categorical prohibition of all certification and specialization claims violates the standards governing regulation of commercial speech under the First Amendment.

1. Petitioner's contention that his certification claim is not commercial speech and cannot be regulated as such is, in all likelihood, not properly presented for review. The briefs filed by the parties in the court below, as well as the opinion of the state court, reveal that the proper categorization of petitioner's speech was neither pressed nor passed on by the Illinois Supreme Court. Accordingly, this Court should decline to consider the issue on the merits.

To the extent the categorization issue is properly presented, petitioner's letterhead certification claim plainly should be regarded as commercial speech. Contrary to petitioner's theory, this Court's statement that the "core notion of commercial speech" is " 'speech which does "no more than propose a commercial transaction," ' " *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983) (citing cases), does not exhaust the definition of commercial speech. Instead, the Court's decisions indicate that commercial speech also encompasses (1) implicit proposals for commercial transactions and (2) speech integrally related to such transactions, especially where the speaker has a financial interest in the transaction.

In this case, petitioner's certification claim is both an implicit proposal for a commercial transaction and speech integrally related to one. First, petitioner's certification claim is a representation about the type and quality of the services he has to offer; as such, it contributes to the beliefs consumers form about his services and enhances their propensity to retain him. The fact that petitioner's

certification claim is directed at fellow practitioners and existing clients rather than new clients does not negate the commercial nature of his message, which remains designed to generate new referrals and continued patronage of existing clients. Second, petitioner's certification claim is integrally related to commercial transactions in which petitioner has a direct financial interest. Like the paid-for speech of a debt collector or credit bureau, petitioner's letterhead certification claim effectuates purely business transactions and is therefore regulable as commercial speech.

2. On this record, the State's absolute prohibition of truthful certification and specialization claims by attorneys violates the First Amendment. Such communications, like other forms of protected commercial speech, facilitate the proper functioning of a market economy by providing consumers with information about the nature and quality of services available from competing practitioners. Although Illinois may protect consumers from false or misleading commercial speech, the State has not demonstrated that certification and specialization claims, which are entirely prohibited by its rule, are inherently misleading.

In addition, this Court's decisions establish that States may not absolutely entirely prohibit truthful commercial speech unless the State makes some demonstration that any potential injury cannot be cured through a more narrowly drawn regulation. In this case, the State may not enact a prophylactic prohibition of all claims of specialization or certification without giving careful consideration to the cost imposed by its absolute ban and to obvious, narrowly drawn alternatives for accomplishing the state interest.

ARGUMENT

I. PETITIONER'S STATEMENT ON HIS BUSINESS LETTERHEAD THAT HE IS A CERTIFIED CIVIL TRIAL SPECIALIST CONSTITUTES COMMERCIAL SPEECH

A. Petitioner's contention that his certification claim is not commercial speech and cannot be regulated as such is, in all likelihood, not properly presented for review by this Court. As we read the briefs filed by the parties in the court below, as well as the opinion of the Illinois Supreme Court, we agree with respondent that the question of the proper categorization of petitioner's speech was neither argued to nor addressed by the Illinois Supreme Court. See Br. in Opp. 11. Petitioner's federal constitutional challenge is therefore raised here for the first time.

With rare exceptions, this Court refuses to "decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale* v. *Louisiana,* 394 U.S. 437, 438-439 (1969). This rule rests on two considerations, both of which are implicated in this case. First, "[q]uestions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Cardinale,* 394 U.S. at 439. In this case, the slim record provides little information bearing on the uses petitioner made of his letterhead, which might affect the proper categorization of his certification claim for First Amendment purposes. Second, "due regard for the appropriate relationship of this Court to state courts requires * * * this Court * * * [to] refus[e] to consider any grounds of attack not raised or decided in" the state court. *McGoldrick* v. *Compagnie Generale Transatlantique,* 309 U.S. 430, 434-435 (1940). Here, although the Illinois Supreme Court applied commercial speech precedents, see Pet. App. 6-8, there was never "any real contest at any stage of this case upon the point," *Morrison* v. *Watson,* 154 U.S. 111, 115 (1894),

such as would allow the Illinois Supreme Court to pass on this question.

To be sure, petitioner vigorously maintained both in the proceedings before the ARDC and in the Illinois Supreme Court that the certification statement appearing on his letterhead was protected speech under the First Amendment. And in resolving this claim, the state court necessarily decided, albeit only implicitly, that the appropriate standard of review was that applied in assessing regulations of commercial speech, as opposed to non-commercial speech. Thus, it could be argued that the question of the proper categorization of petitioner's speech is "only an enlargement of the one mentioned in the assignment of errors" below. *Dewey* v. *Des Moines,* 173 U.S. 193, 197-198 (1899). See, *e.g., Stanley* v. *Illinois*, 405 U.S. 645, 658 n.10 (1972) (*Cardinale* rule is "fully observed" when the case is disposed of "on the constitutional premise raised below" (in that case, the Equal Protection Clause), even though the Court arguably employed a different type of equal protection argument than that raised in the state court). Nevertheless, petitioner's contention that his letterhead statement was fully protected speech is distinct from the contention advanced and passed on below—*i.e.,* that his statement should be protected *as* commercial speech. Accordingly, we believe that this Court should decline to review the categorization issue in this case. Cf. *Illinois* v. *Gates,* 462 U.S. 213 (1983).

B. To the extent that the categorization issue is properly presented, petitioner's letterhead certification claim should plainly be regarded as commercial speech. Although the "core notion of commercial speech" is " 'speech which does "no more than propose a commercial transaction," ' " *Bolger* v. *Youngs Drug Products Corp.,* 463 U.S. at 66 (citing cases)), the Court has never suggested that proposals of transactions exhaust the definition of commercial speech.[9] Instead, this Court's decisions demonstrate that commercial speech is not limited to express proposals but also includes (1) implicit proposals for commercial transactions and (2) speech integrally related to a commercial transaction, particularly when the speaker has a financial interest in promoting the product or service that is the subject of the transaction.

1. That implicit as well as explicit proposals for commercial transactions constitute commercial speech is illustrated by *Friedman* v. *Rogers,* 440 U.S. 1 (1979). In *Rogers*, the Court held that an optometrist's use of a trade name was a form of commercial speech. Of course, a trade name by itself does not explicitly invite the purchase of a product or service. However, like the pharmacist who wishes to advertise his prices, considered in *Virginia Pharmacy Board,* an optometrist using a trade name

> "does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report

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[9] If "commercial speech" were synonymous with "proposals of commercial transactions," the various terms of a commercial contract would receive the same measure of constitutional protection as political expression. In addition, a definition of commercial speech this limited would imply, contrary to this Court's precedents, that full First Amendment protection must be afforded to "the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees," *Ohralik* v. *Ohio State Bar Assn,* 436 U.S. 447, 456 (1978) (citations omitted), as well as labor picketing designed to encourage a secondary boycott, *NLRB* v. *Retail Store Employees Union, Local 1001,* 447 U.S. 607 (1980), and efforts to persuade a private standard-setting organization to exclude a competitor's product, *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.,* 108 S. Ct. 1931 (1988). Needless to say, none of those types of expression merits the same degree of protection as political dialogue and commentary. But cf. *Board of Trustees of the State Univ. of N.Y.* v. *Fox,* 109 S. Ct. 3028, 3036 (1989) ("speech that *proposes* a commercial transaction * * * is what defines commercial speech").

> any particularly newsworthy fact, or to make generalized observations even about commercial matters." [*Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748, 761 (1976).] His purpose is strictly business. The use of trade names in connection with optometrical practice, then, is a form of commercial speech and nothing more.

Id. at 11. The solicitation of business implicit in the use of a trade name should be apparent. Once a trade name has been employed by a business for some time, it serves both to identify that business and "to convey information about the type, price, and quality of services offered for sale." *Ibid.* In this way, the trade name is "part of a proposal of a commercial transaction." *Ibid.*[10]

Speech integrally related to a commercial transaction is likewise regulable as commercial speech, especially where the speaker has a financial interest in promoting the transaction. Thus, in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), a plurality of the Court concluded that, although the expression at issue (financial reports prepared by a private credit reporting agency about private firms) did not constitute economic or commercial speech, "many of the same concerns that argue in favor of reduced constitutional protection in

[10] The Court reached the same result in *Youngs Drug Products.* In that case, the Court held that a contraceptive manufacturer's informational pamphlets were commercial speech, 463 U.S. at 66-68, even though they did not explicitly propose a commercial transaction, *id.* at 63 n.4. Without labeling it so, the Court found that the informational pamphlets, which discussed family planning and venereal disease, implicitly proposed a commercial transaction by either "specifically refer[ing] to a number of [the firm's] condoms * * * and describ[ing] the advantages of each type" or by "refer[ing] to [its products] generically," when it had a large market share and could be expected to benefit from promotion "without reference to its own brand names." *Id.* at 66-67 n.13.

those areas apply here as well." *Id.* at 762 n.8. Relying upon the Court's commercial speech decisions, the plurality found that the credit reports could be regulated for their accuracy for several reasons: they communicated information of interest solely to the credit reporting agency and its specific business audience; they were distributed to a limited audience; like advertising, they were unlikely to be chilled by incidental state regulation, since they were created for profit; they were arguably more objectively verifiable than other forms of speech; and finally, they were likely to be influenced by market forces. See *id.* at 762-763.

Speech that either implicitly solicits a commercial transaction or is integrally related to one serves an identical function to speech that explicitly proposes a commercial transaction. All three forms of speech are valued principally for the "facts" they convey. In contrast, discussion of governmental affairs, which lies "at the heart of the First Amendment's protection," *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 776 (1978); see *Boos* v. *Barry,* 108 S. Ct. 1157, 1162 (1988), is valued less for its factual content than for its political and ideological expression. See *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. at 779 (Stewart, J., concurring). Proposals for commercial transactions and speech integrally related to them share other identifying characteristics. Factual representations contained in each of these forms of speech are "easily verifiable," the speaker "presumably knows more * * * than anyone else" about the subject matter, and in each case the speech is "more durable than other kinds" of speech, because of the financial motivations of the speaker. *Id.* at 772 n.24. Consequently, because of the "greater objectivity and hardiness" of these forms of speech, it is "less necessary to tolerate inaccurate statements for fear of silencing the speaker." *Ibid.*

2. In this case, petitioner's claim that he is a "certified civil trial specialist," appearing in the context of the letterhead on his business stationery, should be regarded as an implicit solicitation of a commercial transaction. Petitioner's statement is a claim by one engaged in the provision of legal services about the "type * * * and quality of services" he has to offer. *Friedman* v. *Rogers,* 440 U.S. at 11.[11] Like product or service claims generally, petitioner's claim contributes to the beliefs consumers form about his services and enhances their propensity to retain him. Like the commercial trade name in *Rogers*, then, the claim made on petitioner's business letterhead is "a form of commercial speech and nothing more." *Ibid.*

That petitioner does not use his letterhead stationery to solicit new clients directly does not alter the analysis. By restricting use of his stationery to current clients and fellow attorneys, petitioner has simply chosen a more subtle way to solicit commercial transactions. Petitioner, like many attorneys who do not overtly advertise their services, "must rely on his contacts with the community to generate a flow of business." *Bates* v. *State Bar*, 433 U.S. 350, 378 (1977). Indeed, "referrals by other lawyers constitute a substantial portion of petitioner's legal business." Pet. 17. Petitioner's letterhead claim helps build his reputation as a civil litigator, and consequently helps petitioner secure new business from fellow attorneys and from existing clients, who may refer to him persons in need of a civil trial lawyer. In addition, current non-litigation clients may bring litigation matters to petitioner to avail themselves of his implied prowess in the courtroom. And even if the certification claim adorning petitioner's letterhead does not contribute new business, it may nonetheless ensure his current clients' continuing satisfaction with his performance and retention of his services.[12] While less overtly commercial than a public advertisement, petitioner's letterhead claim is functionally equivalent to more explicit forms of solicitation and merits no more protection under the First Amendment.

[11] For example, petitioner's letterhead describes the location of his office, the colleague who practices with him, the States in which each is licensed to practice, and the fact that petitioner is a certified civil trial specialist by the NBTA. Pet. App. 21a.

Petitioner maintains that to treat his letterhead claim as commercial speech because of its potential to generate referrals would sow confusion among attorneys, who would fear regulation whenever they participated "in bar association and civic activities * * * motivated in part by a desire to enhance professional opportunities by acquainting others in the profession and the community with the attorney's special knowledge and expertise." Pet. 17. The use of a letterhead that touts the attorney's professional qualifications, however, is not merely incidental to some broader communicative purpose that might properly be accorded greater First Amendment protection than that given commercial speech. Petitioner's letterhead certification claim is "strictly business." *Friedman* v. *Rogers,* 440 U.S. at 11.

Even if petitioner's letterhead were not used in any way to solicit or retain business, it is nonetheless speech integrally related to commercial transactions in which petitioner has a direct financial interest, and is therefore

[12] The Commission's experience under its Trade Regulation Rule on Mail Order Merchandise, 16 C.F.R. 435.1, provides a useful analogy. That Rule regulates both claims used by mail order merchandisers to induce consumers to purchase a product, and claims made by the merchandisers concerning subsequent aspects of the transaction. The latter types of claims (regarding, among other things, when a product will actually be shipped and why any shipping delay has occurred), may be used to persuade the consumer not to withdraw from a transaction he or she has already entered. See also Fair Credit Billing Act, 15 U.S.C. 1666 (regulating statements made by credit card issuer regarding consumers' obligation to pay disputed billing charges).

regulable as commercial speech. Consider in this regard a letter demanding settlement of a personal injury claim, payment of an alleged debt, or some other concession from its recipient. Particularly if that recipient is a layman, such a letter may well strike with greater force if sent on stationery that proclaims that its author is no stranger to the courtroom. This form of speech, like speech that proposes a commercial transaction, has value only if it is truthful, and no broader goals of free expression are impaired by requiring it to be accurate.

Congress has expressly recognized the threat posed by the deceptive and harassing speech that is sometimes used to collect debts, and has regulated such speech in the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692. That Act prohibits anyone acting as a "debt collector" (including attorneys) from making "any false, deceptive, or misleading representation * * * in connection with the collection of any debt." 15 U.S.C. 1692e. The Commission is empowered to remedy violations of the FDCPA "as if the violation had been a violation of a Federal Trade Commission trade regulation rule." 15 U.S.C. 1692*l*(a).

In other situations as well, Congress has regulated the accuracy of speech which effects commercial transactions (and hence is integrally related to such transactions), even though such speech does not propose a commercial transaction. For example, the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681, imposes rules to ensure the accuracy of consumer credit reports. To ensure that the "speech" sold by credit reporting agencies is accurate, the Act requires any agency preparing such a report to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. 1681e(b). A violation of the FCRA "shall constitute an unfair or deceptive act or practice * * * and shall be subject to enforcement by the Federal Trade Commission." 15 U.S.C. 1681s(a). See, *e.g.*, *Trans Union Credit Information Co.*, 102 F.T.C. 1109 (1983).

We recognize, of course, that much for-profit speech (*e.g.*, the paid-for articles of a journalist) is not commercial speech. See *Board of Trustees of the State Univ. of N.Y.* v. *Fox, supra*; *Riley* v. *National Federation of the Blind,* 108 S. Ct. 2667, 2677 (1988). Cf. *Bolger* v. *Youngs Drug Products Co.*, 463 U.S. at 67 n.14 ("Of course, a different conclusion may be appropriate in a case where the pamphlet advertises an activity itself protected by the First Amendment."). Still, some "paid-for" speech, such as that of the debt collector or the credit bureau regulated by the statutes discussed above, is clearly so integrally related to purely business transactions that it must be subject to regulation as commercial speech. This is especially true where the speaker has a direct financial interest in a commercial transaction (as does the debt collector), or develops and sells the information solely for use in a commercial transaction (as does the credit bureau).

II. A BAN ON ALL TRUTHFUL REPRESENTATIONS OF PROFESSIONAL SPECIALIZATION OR CERTIFICATION IS IMPERMISSIBLE ON THIS RECORD UNDER THE FIRST AMENDMENT

Although the First Amendment provides less protection to commercial speech than to political expression, the decisions of this Court recognize the important function that commercial speech serves in a market economy. In *Virginia Pharmacy Board* v. *Virginia Consumers Council,* the Court observed that the free flow of commercial information "is indispensable to the proper allocation of resources in a free enterprise system." 425 U.S. at 765. Accord, *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557, 561-562 (1980). Commercial information enables consumers to make better-informed judgments in procuring the services of professionals, *Bates* v. *State Bar,* 433 U.S. 350, 364 (1977), and facilitates the use of professional services by consumers who otherwise would not find or use professionals at all, *id.* at 370; see *Zauderer* v. *Office of Disciplinary Counsel,* 471 U.S. at 646.

A. Consumers Benefit From the Information Conveyed by Certification

The relationship between professionals who provide services and the consumers who purchase those services is often characterized by asymmetric information.[13] Many professionals provide services that require highly specialized, technical expertise. For their part, consumers generally lack the information and repeat purchase experience needed to evaluate the quality of professional services. For example, an unsuccessful litigant may be unable to determine whether he lost because his case lacked merit or because his lawyer was incompetent. Similarly, a patient who fails to recover from an illness may be unable to determine whether the treatment's failure reflects the limitations of medical science or those of her doctor.

Voluntary certification is a market response to this informational asymmetry. By signifying that the professional's qualifications satisfy some objective standard, legitimate certification mechanisms facilitate consumers' differentiation of professionals "between those who possess certain desired characteristics and those who do not." W. Gellhorn, *Individual Freedom and Government Restraints* 147 (1956). See A. Wolfson, M. Trebilcock & C. Tuohy, *Regulating the Professions: A Theoretical Framework in Occupational Licensure and Regulation* 203 (S. Rottenberg ed 1980). Examples of voluntary certification are familiar to virtually every consumer. The Good Housekeeping Seal and the Underwriter's Laboratories emblem certify many products.[14] In the area of profes-

[13] See A. Wolfson, M. Trebilcock & C. Tuohy, *Regulating the Professions: A Theoretical Framework* in *Occupational Licensure and Regulation* 180, 190-91 (S. Rottenberg ed. 1980) [hereinafter Rottenberg]; Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards,* 87 J. Pol. Econ. 1328 (1979); H. Leland, *Minimum-Quality Standards and Licensing in Markets with Asymmetric Information,* in Rottenberg 265; S. Young, *The Rule of Experts: Occupational Licensing in America* 15-17 (1987).

[14] As this Court recently observed, the promulgation of product standards by private organizations "through procedures that prevent

sional services, medical boards certify practitioners in most medical specialties. Less formally, employers often rely on certification in selecting their employees. For example, a law firm that recruits associates only from the ranks of selected law schools is effectively using the law schools as certification organizations.[15]

Professional certification can thus help consumers predict the nature of the services available from various practitioners.[16] As the Alabama Supreme Court observed in holding unconstitutional a total ban on attorneys' truthful representations of certification, "[i]t would be less than realistic for us to take the position that all lawyers, in fact, possess equal experience, knowledge and skills with regard to any area of legal practice." *Ex parte Howell,* 487 So. 2d 848, 851 (Ala. 1986). Certification mechanisms may provide a useful means for consumers to overcome informational shortcomings that obscure differences in the experience, knowledge, and skills of practitioners.

Consumers are best served by certification programs when certification represents an objective measure of a pro-

the standard-setting process from being biased by members with economic interests in stifling product competition * * * can have significant procompetitive advantages." *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.,* 108 S. Ct. at 1937.

[15] Even a department store may act as a certification body by certifying the quality of the products it sells. M. Friedman, *Capitalism and Freedom* 146 (1962). See also Marvel & McCafferty, *The Welfare Effects of Resale Price Maintenance,* 28 J.L. & Econ. 363, 369 (1985).

[16] The information provided by certification of professionals is necessarily predictive because it assumes a correlation between measured inputs, such as the practitioner's training and experience, and output. Such predictions are by necessity imperfect. Some who have attained certification are likely to provide lower quality services than some who have not. See A. Wolfson, M. Trebilcock & C. Tuohy in Rottenberg 204. The same may be said for virtually any form of certification. For example, academic achievement is an imprecise predictor of job performance but it is nonetheless used by those employers who find its predictive benefits to outweigh the costs of its imprecision.

fessional's performance that is relevant to the services the professional provides. Absent these conditions, claims of certification may indeed be deceptive. It is not difficult to imagine "diploma mills" that certify any practitioner willing to pay the requisite fee. Claims of certification may also be misleading to consumers when the professional is certified in a field that is not relevant to the services he offers. For these reasons, government regulation of professionals' certification claims may be appropriate to prevent or cure deception.[17] As discussed below, the two States other than Illinois to consider the issue in a litigated setting have opted for regulation of certification programs, rather than altogether banning certification claims, as Illinois has done.

B. In Light of the Present Record, the Illinois Rule Prohibiting Any Reference to Specialization or Certification Violates the First Amendment

This Court has construed the First Amendment to protect truthful descriptions of the price and terms of routine legal services. See *Bates* v. *State Bar,* 433 U.S. at 384. The Court has also protected truthful statements announcing the availability of legal services. See *Shapero* v. *Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1917 (1988) (mass mailing "to potential clients who have had a foreclosure suit filed against them"). Those protections for speech concerning the affordability and availability of legal services are in-

[17] The Commission has taken enforcement action against organizations that grant certifications without adequately evaluating the products they approve. See *National Ass'n of Scuba Diving Schools, Inc.*, 100 F.T.C. 439 (1982) (consent order barring organization from issuing seals of approval without conducting tests to determine whether products meet an objective standard of quality or performance); *Hearst Magazines, Inc.*, 32 F.T.C. 1440 (1941) (order prohibiting issuance of seals of approval without sufficient testing to assure that products fulfilled claims made about them). Cf. *Ohio Christian College*, 80 F.T.C. 815 (1972) (false claim that college's accrediting organization was "a recognized bona fide accrediting agency").

complete without similar protection for speech concerning the ability of the professionals rendering such services.[18] Under the Court's framework for analyzing state regulation of commercial speech, the Illinois Supreme Court's flat prohibition of any claims of certification or specialization violates the First Amendment.

The Court's general approach for determining the constitutionality of restrictions on commercial speech, including "the commercial speech of attorneys," is "well settled." *Zauderer* v. *Office of Disciplinary Counsel,* 471 U.S. at 638. Accord, *Shapero* v. *Kentucky Bar Ass'n,* 108 S. Ct. at 1921; *In re R. M. J.,* 455 U.S. 191, 203 & n.15 (1982). The applicable test is that set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557, 564 (1980). Under that test, commercial speech is entitled to constitutional protection if it is "neither misleading nor related to unlawful activity"; if the communication meets that threshold test, it may then be restricted only if (1) the government asserts a substantial interest to be achieved by the restrictions, (2) the restrictions directly advance the government's asserted interest, and (3) the restrictions are no more extensive than is reasonably necessary to effectuate that interest. *Ibid.*

1. *Because the State Has Failed To Demonstrate That A Truthful Statement of Professional Specialization Or Certification Is Inherently Misleading, Petitioner's Letterhead Claims Are Entitled To Protection Under The First Amendment*

The initial question posed by *Central Hudson* is whether the communication at issue is either inherently misleading

[18] "Although the system may have worked when the typical lawyer practiced in a small, homogenous community in which ascertaining reputational information was easy for a consumer, commentators have seriously questioned its current efficacy. * * * The trends of urbanization and specialization long since have moved the typical practice of law from its small-town setting. * * * Information as to the qualifications of lawyers is not available to many. * * * And if

or relates to unlawful activity, in which case it may be prohibited entirely. There is no question of the lawfulness of the certification at issue in this case. The Illinois Supreme Court determined, however, that the petitioner's truthful representation of NBTA certification on his letterhead was "inherently misleading." Pet. App. 7a (quoting *In re R. M. J.*, 455 U.S. at 203); Pet. App. 11a. The gist of the Illinois Supreme Court's concern was that, in the minds of the public, the NBTA's voluntary certification of trial advocates would be confused with the State's mandatory licensing of attorneys to practice law.

However, it is highly unlikely that an attorney's truthful representation that he has been certified by the *National* Board of Trial Advocacy would mislead the public to believe that his certification constituted some kind of state license to practice law. In explanation of its hypothesis, the court relied on "the similarity between the words 'licensed' and 'certified'." Pet. App. 9a. The court documented this assertion with a highly edited quotation of a dictionary definition of the word "certificate." According to the state court:

> Webster's dictionary defines 'certificate' as 'a document containing a certified and usually official statement . . ., especially,: a document issued by . . . a state agency . . . certifying that one has satisfactorily . . . attained professional standing in a given field *and may officially practice or hold a position in that field.*'

Ibid. (quoting *Webster's Third New International Dictionary* 367 (1986) (omissions and emphasis in original)). In fact, the last portion of the sentence modified by the state court reads as follows in the original:

> [A] document issued by a school, a state agency, or a professional organization certifying that one has satisfactorily completed a course of studies, has passed a qualifying examination, or has attained professional standing in a given field and may officially practice or hold a position in that field.

Webster's Third New International Dictionary 367 (1986). Thus, the authority relied upon by the state court rebuts the State's contention that the terms "certificate" and "license" are coextensive. Although that dictionary identifies an official sanction to practice a profession as one meaning of "certificate," it gives as an equally valid meaning the one used by petitioner—a document issued by a professional organization certifying that one has attained certain professional qualifications. In addition, "certificates" that do not constitute official state documents, such as those given for superior job performance or attendance is seminars, are sufficiently common to suggest that claims that a person is "certified" will not automatically be equated with mandatory licensure by the State.[19]

The Illinois court's narrower contention—that petitioner's claim of specialization in a particular field falsely implies that he has been formally recognized as a specialist by the State—is also not self-evident.[20] *Webster's Third New International Dictionary,* the principal authority

available, it may be inaccurate or biased." *Bates* v. *State Bar*, 433 U.S. at 374-375 n.30.

[19] The literature on this subject draws a sharp distinction between mandatory licensure and voluntary certification. See, *e.g.*, M. Friedman, *supra*, at 144-149; S. Young, *supra*, at 18-19.

[20] The Illinois Supreme Court took judicial notice of a draft report of the American Bar Association's Standing Committee on Ethics and Professional Responsibility. The report said that the term "specialty" had "acquired a secondary meaning implying formal recognition as a specialist." Pet. App. 13a. The recommendations of the draft report, to which the Illinois Supreme Court attached great weight, have since been adopted by the ABA House of Delegates. The report evidently equates "formal" recognition—which the petitioner in this case plainly possesses—with state recognition, for it concludes that a truthful claim of specialization is misleading except in States "which provide procedures for certification or recognition of specialization." *Ibid.* The report does not describe the evidentiary basis for the ABA committee's conclusions.

relied on by the state court, does not even suggest in its definition of "specialist" that the word implies state licensure. *Webster's Third New International Dictionary* 2186 (1986). Medical specialties are commonly recognized by private, voluntary boards,[21] and research reveals no State that formally licenses medical specialists.[22] Moreover, one can readily think of numerous other claims of specialty—from "air conditioning specialist" in the realm of home repairs to "foreign car specialist" in the realm of automotive repairs—that cast doubt on the notion that the public would automatically mistake a claim of specialization for a claim of formal recognition by the State. Indeed, the Illinois Supreme Court by rule permits trademark lawyers to hold themselves out as "Trademark Lawyer[s]," Pet. App. 2a, and the court expressed no concern in its opinion that claims of specialization in the trademark area imply formal state recognition of that specialty.

Neither of the two other state supreme courts to consider the issue in a litigated setting even suggested that truthful statements of certification or specialization could be mistaken for state licensing. See *Johnson* v. *Director of Professional Responsibility*, 341 N.W.2d 282 (Minn. 1983); *Ex parte Howell*, 487 So.2d 848 (Ala. 1986). Of course, when "the possibility of deception is * * * self-evident," the State "need not require * * * '* * * a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.' *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. [374,] 391-392 [(1965)]." *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. at

[21] See F. Campion, *The AMA and U.S. Health Policy Since 1940*, at 32 n.*, 435-440 (1984).

[22] See F. Grad & N. Marti, *Physicians' Licensure & Discipline* 81 (1979) ("Unlike state licensure of the practice of medicine generally, medical specialization is supervised by independent specialty boards, which are private, non-profit organizations without any governmental authority"). See generally *id.* at 81-83.

652-653. But when the State's theory of deception is as dubious as it is in this case, the State should be required to present some evidence to support a claim of deception before it may promulgate an across-the-board prohibition of an entire class of representations.[23]

The state's final basis for finding certification claims to be inherently misleading is that such a statement "is tantamount to a claim of superiority by those attorneys who are certified." Pet. App. 9a. Although certification does convey a message that the professional possesses an attribute that some consumers may find desirable, it is not a statement that the professional is a superior practitioner to those who do not possess that attribute.[24] Indeed, the Il-

[23] In reviewing determinations by the Federal Trade Commission that a practice is "deceptive" within the meaning of Section 5(a) of the FTC Act, 15 U.S.C. 45(a), this Court has recognized that "the words 'deceptive practices' set forth a legal standard and * * * must get their final meaning from judicial construction," but that "the Commission's judgment is to be given great weight by reviewing courts," particularly because "the finding of a [section] 5 violation in this field rests so heavily on inference and pragmatic judgment." *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965).

The deference accorded FTC determinations stems, in part, from this Court's recognition that "as an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the Act." *FTC* v. *Colgate-Palmolive*, 380 U.S. at 385. See, *e.g.*, the Commission's elaboration of the legal standards for determining deception in *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 164-166 (1984). Whether comparable deference is due the determinations of a state body may, therefore, depend upon the identity and functions of that body. Cf. *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. at 659 n.3 (opinion of Brennan, J.) ("In evaluating the necessary form and content of disclosure, courts of course should be guided by the 'enlightenment gained from administrative experience * * *."). Here, the State's implausible theory of deception would not survive even the deferential review applied to FTC determinations that a practice is deceptive.

[24] Claims of a desirable attribute are common in product advertising. While claims that a detergent contains a whitener, that a tire is steel-belted, or that an automobile is equipped with antilock brakes

linois court's equation of a claim of a desirable attribute with a superiority claim proves too much. Under the court's logic, a truthful claim that an attorney concentrates in real estate law or that an optometrist is trained in fitting patients with extended wear contact lenses could be altogether proscribed on the ground that consumers might construe such statements to claim superiority over professionals who do not advertise.[25] Just as in *Zauderer* v. *Office of Disciplinary Counsel,* where the attorney advertised that he "had represented other women in Dalkon Shield litigation—a statement of fact not in itself inaccurate," 471 U.S. at 640 n.9, the State's defense that its restriction on the advertisement was " 'an allowable restriction * * * [of a claim] of asserted expertise,' " *ibid.*, is quite "beside the point," *ibid.* "Although [the Court's] decisions have left open the possibility that States may prevent attorneys from making non-verifiable claims regarding the quality of their services, see *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 366 (1977), they do not permit a State to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas." *Ibid.* (citation omitted). Unless the claim that the professional possesses the specified attribute is deceptive for some other reason,[26] it is entitled to First Amendment protection.

convey the message that the products possess a desirable attribute, they do not convey the message that the products are superior to all competing products.

[25] Under the Illinois court's logic, a physician could be prohibited from advertising board certification.

[26] Compare *In re R. M. J.*, 455 U.S. at 205 (truthful statement of admission to Supreme Court Bar "could be misleading to the general public unfamiliar with the requirements of admission to the Bar of this Court," presumably because it may falsely imply that such admission requires special expertise) with *Ex parte Howell,* 487 So.2d at 851 (NBTA certification "indicate[s] a level of expertise with regard to trial advocacy in excess of the level of expertise required for admission to the bar generally").

The State has failed to provide a colorable basis for concluding that it is inherently or inevitably[27] misleading for petitioner to state on his letterhead that he has been certified as a civil trial specialist by the NBTA. Even if such a claim had the potential to be misleading, however, it would not be bereft of constitutional protection. The decisions of this Court make clear that while States may ban misleading commercial speech entirely, they "may not place an absolute prohibition on certain types of potentially misleading information * * * if the information also may be presented in a way that is not deceptive." *In re R. M. J.*, 455 U.S. at 203. Accordingly, if petitioner's otherwise truthful certification claim were misleading, the State could still not ban the claim entirely if it could be presented in such a way as to be neither deceptive nor misleading. This possibility is explored in the next section.

2. *A Prophylactic Ban On All Truthful Claims Of Profesional Specialization Or Certification Is Broader Than Reasonably Necessary To Advance Any Demonstrated State Interest In This Case*

Because petitioner's certification claim is neither unlawful nor inherently misleading, the question whether it may be prohibited must be determined by means of the final three elements of the *Central Hudson* inquiry—namely, whether Illinois's interest is substantial, whether its disciplinary rule advances that interest, and whether its rule is no broader than is reasonably necessary. Although the State has the burden of justifying its restrictions, *Board of Trustees of the State Univ. of N.Y.* v. *Fox,* 109 S. Ct. at 3034-3035, the Illinois Supreme Court did not address these issues in light of its determination that any claim of certification or specialization is inherently misleading and can thus be prohibited entirely. Measuring

[27] See *In re R. M. J.*, 455 U.S. at 202 ("necessarily or inherently misleading") *Bates* v. *State Bar,* 433 U.S. at 372 ("inherently" or "inevitably" misleading).

Illinois's disciplinary rule against the dictates of the Constitution as articulated by *Central Hudson*, it is clear that the state rule sweeps far too broadly.

As to the first element of the *Central Hudson* test, the State of Illinois unquestionably has a substantial interest in ensuring that representations concerning specialization or certification are not used to deceive consumers.[28] The Illinois Supreme Court also asserted a substantial state interest in protecting the State's licensing powers by preventing confusion between voluntary private certification and its own mandatory licensing. Cf. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975).

With respect to the second element of the test, however, those interests are only partly advanced by Illinois's disciplinary rule. Obviously, an absolute ban on all certification and specialty claims advances the State's interest of ensuring that such communications do not mislead consumers—an absolute ban on speech unquestionably bars misleading (as well as truthful) speech. But although the State also has a valid interest in preventing the confusion of private certification with its own licensing mechanisms, the preceding section demonstrated that there is no basis either in common sense or in evidence for concluding that such confusion in fact exists. Therefore, the ban cannot be held to advance that interest.

The last question posed by *Central Hudson* is whether the restrictions are more extensive than is necessary to achieve the State's interests. As the Court explained in *Board of Trustees of the State Univ. of N.Y.* v. *Fox*, while this last prong of the *Central Hudson* test does not require

[28] Although the Illinois Supreme Court did not articulate this interest, the two other state supreme courts to have considered the issue have expressed the concern that permitting statements of certification to be made "might spawn spurious certifying organizations whose certifications would be meaningless," *Ex parte Howell*, 487 So. 2d at 851, or mislead "an uninformed public by claims of specialization and quality of services," *Johnson* v. *Director of Professional Responsibility*, 341 N.W.2d at 285.

the State to use the least restrictive means to achieve its interests, it does require the State to employ "a means narrowly tailored to achieve the desired objective." 109 S. Ct. 3035.

Because, as demonstrated above, truthful claims of certification or specialization are not inherently misleading, they plainly can be presented in ways that are not deceptive. It follows that such claims cannot be entirely forbidden unless the State can show that the prohibition adopted is not disproportionate to the state interest served. *In re R. M. J.*, 455 U.S. at 203. See *Shapero* v. *Kentucky Bar Ass'n*, 108 S. Ct. at 1924; *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. at 646. In this case, the State has adopted a prophylactic ban on all truthful statements concerning specialization or certification without considering more narrowly tailored means of achieving its purpose. For example, insofar as the State is concerned that the public will rely on claims of certification from spurious organizations, it might promulgate rules for approving certifying organizations. That solution was adopted by the two other state supreme courts that have considered the issue. *Johnson* v. *Director of Professional Responsibility*, 341 N.W.2d at 285; *Ex parte Howell*, 487 So.2d at 851.[29] If confusion of private certifications with state licenses were shown to be a problem, the State could require disclosure of the private nature of the certification, or could require placement of the certification claim away from the listing of States in which

[29] The Illinois Supreme Court's observation that the state had "not provided for any procedure for formal recognition of specialists in the practice of law," Pet. App. 13a-14a, fails to satisfy the First Amendment's requirement that the State "carefully calculate[]" the cost that its regulation would impose, *Board of Trustees of the State Univ. of N.Y.* v. *Fox*, 109 S. Ct. at 3035. The court did not consider either the costs that its absolute prohibition imposes, or the practicability of adopting certain obvious, narrowly-tailored means for accomplishing its objectives, such as a state recognition procedure.

the attorney is licensed to practice law.[30] In keeping with this Court's directive that restrictions on commercial speech be in proportion to the state interest served, however, a total ban on truthful representations is disproportionate to the risk of deception through spurious certification. "[T]he free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Shapero* v. *Kentucky Bar Ass'n*, 108 S. Ct. at 1924 (quoting *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. at 646).

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[30] The cure for such potential deception would lie not in barring the representation but in "requir[ing] a statement explaining the nature of" the certification. *In re R. M. J.*, 455 U.S. at 205. Cf. *Shapero* v. *Kentucky Bar Ass'n*, 108 S. Ct. at 1923 (total ban of potentially abusive communications improper where State can review communications and punish wrongdoers); *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. at 644-647 (total ban of solicitation of legal employment through advertising improper since State can punish lawyers who publish deceptive advertisements); *id.* at 651 (" '[W]arning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.' " (citations omitted)); *In re R. M. J.*, 455 U.S. at 201 (" 'the preferred remedy is more disclosure, rather than less' "); *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 97 (1977) ("[T]he remedy to be applied is more speech, not enforced silence." (quoting *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

CONCLUSION

For the foregoing reasons, the judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted.

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SEPTEMBER 1989

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In the Supreme Court of the United States

October Term, 2008

GARY S. FEIL,

Appellant,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

Appellee.

APPEAL FROM
THE SUPREME COURT OF ILLINOIS

[redacted]

[redacted]

Counsel of Record

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Academy of Certified Trial Lawyers of Minnesota ("ACTLM") hereby moves for leave to file the attached brief *amicus curiae* in support of Appellant Gary Peel. The consent of Appellant has been obtained. The consent of Respondent has not been obtained.

STATEMENT OF INTEREST

The ACTLM is an organization of Minnesota attorneys certified by the National Board of Trial Advocacy ("NBTA"). The ACTLM has been closely involved in Minnesota's certification debate.

Clarance Hagglund is a civil trial specialist certified by the NBTA and by the Civil Litigation Section of the Minnesota State Bar Association. He is also a member of the Minnesota

Board of Legal Certification established by the Minnesota Supreme Court to approve and regulate agencies certifying Minnesota attorneys. Hagglund was dean of the ACTLM from 1983 to 1985.

Hagglund was admitted to practice before this Court on April 4, 1960.

REASON FOR AMICUS CURIAE BRIEF

In 1983, the Minnesota Supreme Court struck down its DR 2-105(B), which contained a blanket prohibition of attorney specialization advertising. The rule was substantially the same as Illinois' Rule 2-105(a) at issue here.

Minnesota now has an effective program of attorney specialization. The attached amicus curiae brief focuses on Minnesota's experience with certified specialization. Minnesota's experience shows that blanket prohibitions of specialization advertising are uncon-

stitutionally broad. State-regulated certification provides objective standards for specialization without barring accurate advertising of certified specialization.

Respectfully Submitted,

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No. 88-1775

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1988

Gary E. Peel,

Appellant,

v.

Attorney Registration and Disciplinary Commission of Illinois.

Appellee.

APPEAL FROM
THE SUPREME COURT OF ILLINOIS

BRIEF AMICUS CURIAE FOR THE ACADEMY OF CERTIFIED TRIAL LAWYERS OF MINNESOTA IN SUPPORT OF APPELLANT

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Minnesota

Between 1967 and 1981, the Minnesota State Bar Association ("MSBA") considered several specialization/certification proposals. Only one was adopted by the MSBA -- a 1976 limited designation plan. The designation plan would have allowed attorneys to advertise several areas of law in which they practiced. The Minnesota Supreme Court refused to adopt it.

In 1980, an MSBA specialization committee drafted the Minnesota Plan of Specialization. The Minnesota Plan was a revised version of the 1979 American Bar Association ("ABA") Model Plan of Specialization. The Minnesota Plan would have allowed specialty committees to certify attorneys in specialty areas. The MSBA General Assembly voted to table the Minnesota Plan in both 1980 and 1981.

In 1982, Minnesota attorney Richard Johnson placed two essentially identical advertisements in local telephone directories. In the advertisements he represented himself as a "CIVIL TRIAL SPECIALIST CERTIFIED BY NATIONAL BOARD OF TRIAL ADVOCACY." The advertisements were accurate -- Johnson had been certified in 1980 as a civil trial specialist by the National Board of Trial Advocacy ("NBTA").

Based upon the advertisements, in February of 1983 the Director of the Minnesota Board of Professional Responsibility ("MBPR") charged Johnson with unprofessional conduct. An MBPR panel affirmed, finding the advertisement violated DR 2-105(B) even though it was not misleading or deceptive. DR 2-105 provided as follows:

> A) A lawyer shall not use any false, fraudulent, misleading or deceptive statement, claim

> or designation in describing his or her firm's practice or in indicating its nature or limitations.
>
> B) A lawyer shall not hold out himself or his firm as a specialist unless and until the Minnesota Supreme Court adopts or authorizes rules or regulations permitting him to do so.

Johnson appealed to the Minnesota Supreme Court in June of 1983.

In In Re Johnson, 341 N.W.2d 282 (Minn. 1983), the court declared DR 2-105(B) unconstitutional and vacated the admonishment against Johnson. The Court held DR 2-105(B) was overbroad, since it barred truthful advertising of specialization. Id. at 285.

In June of 1984, the MSBA General Assembly adopted a resolution concerning specialization. The resolution directed the MSBA to petition the Minnesota Supreme Court to approve a lawyer specialization certification program and

to create the Minnesota Board of Legal Certification ("MBLC").

In January of 1985, the Minnesota Supreme Court held a public hearing regarding the amendment of the Minnesota Rules of Professional Conduct to include Rule 7.4. The rule was adopted by the court, along with the other rules of professional conduct, effective September 1, 1985. Rule 7.4 provides that a lawyer may not state or imply that she/he is a specialist in a field of law unless certified by an entity approved by the proposed MBLC:

> (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not use any false, fraudulent, misleading or deceptive statement, claim or designation in describing the lawyer's or the lawyer's firm's practice or in indicating its nature of limitations.
>
> (b) Except as provided in this rule, a lawyer shall not

> state or imply that the lawyer is a specialist in a field of law unless the lawyer is currently certified as a specialist in the field by a board or other entity which is approved by the State Board of Legal Certification. Among the criteria to be considered by the Board in determining upon application whether to approve a board or entity as an agency which may certify lawyers practicing in this state as being specialists shall be the requirement that the board or entity certify specialists on the basis of published standards and procedures which (1) do not discriminate against any lawyer properly qualified for such certification, (2) provide a reasonable basis for the representation that lawyers so certified possess special competency, and (3) require redetermination of the special qualifications of certified specialists after a period of not more than five years.
>
> (c) A lawyer shall not state that the lawyer is a certified specialist if the lawyer's certification has terminated, or if the statement is otherwise contrary to the terms of such certification.

In June of 1985, the MSBA submitted proposed MBLC rules to the Minnesota Supreme Court. The court adopted the rules, with amendments, in October of 1985. Under its rules, the MBLC approves and regulates certifying agencies, and identifies the areas of practice subject to specialty certification. MBLC Rules 3.01 and 3.02.

Certifying agencies must use three criteria to determine a lawyer's "special competence": (1) substantial involvement in the field, (2) peer recommendations, and (3) objective evaluation. MBLC Rule 5.02. "Substantial involvement" requires a minimum of 25% of the lawyer's practice have been in the specialty area the previous three years. MBLC Rule 5.021. "Peer recommendations" are from attorneys or judges familiar with the competence of the lawyer. MBLC Rule 5.022. "Objective evaluation" means oral or written

examination of the substantive and procedural law in the specialty area. MBLC Rule 5.023.

The MBLC approved the NBTA as a certifying agency in November of 1987. Approximately 90 Minnesota attorneys are NBTA-certified as civil or criminal trial specialists.

The MBLC also approved the MSBA Civil Litigation Section as a certifying agency in February of 1988. The Section has given three exams, and has certified 152 attorneys to date.

Finally, the MBLC approved the MSBA Real Property Section as a certifying agency in April of 1989. The Section's first exam is scheduled for November of 1989.

Minnesota attorneys certified by the NBTA, the Civil Litigation Section, or the Real Property Section may now advertise themselves as "specialists."

Other attorneys may only advertise the areas of law in which they "practice."

SUMMARY OF ARGUMENT

State-approved certification of specialists, combined with a prohibition of specialization advertising by non-certified attorneys, enables the state to prohibit misleading specialization claims by non-certified attorneys. Therefore, a blanket prohibition of specialization advertising is unnecessarily and unconstitutionally broad.

States can further regulate misleading specialization claims by prohibiting lawyers from advertising they "practice" in certain areas of law. This is an implied claim of specialization. Such a claim can mislead the public, since an attorney with no experience or competence in a specialty can "practice" in the specialty.

Certification does more than introduce objective specialization criteria. It produces enlightened self-interest among attorneys, giving them an incentive to improve their skills. Improved skills benefit the client and increase public confidence in the legal profession.

The Court can use this case as a vehicle to encourage federal certification of specialists. Federal certification would produce higher and more uniform practice standards before the federal courts. Further, because of cross-practice between federal and state courts, federal specialization would produce higher and more uniform standards in states not certifying specialists.

ARGUMENT

I. ABSOLUTE PROHIBITION OF SPECIALIZATION ADVERTISING IS UNCONSTITUTIONALLY BROAD.

Restraints on attorney commercial speech not inherently deceptive must be "narrowly crafted to serve the State's purposes." Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2278 (1985). Although states have a legitimate interest in prohibiting misleading attorney advertising, "the States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive." In Re R.M.J., 102 S. Ct. 929, 937 (1981). The burden is on a state with a blanket prohibition to make a substantial showing that less restrictive alternatives will not suffice. Zauderer, 105 S. Ct. at 2276, 2278.

Minnesota's experience shows Illinois' blanket prohibition of specialization advertising to be unconstitutionally broad. A state's only legitimate interest in restricting attorney advertising is to prevent misleading or deceptive commercial speech. However, there is nothing misleading or deceptive about an attorney accurately informing the public of certification by a particular certifying agency -- as long as the state is satisfied the certifying agency's standards are rigorous and ensure competency.

Of course, advertising of certification can be accurate but misleading. An attorney might obtain certification from a mail-order diploma mill with little more than payment of a fee. Advertising such certification would be accurate while misleading the public.

However, states can eliminate such misleading advertising by either certifying specialists themselves or approving other certifying agencies. Blanket prohibition of specialization advertising is unnecessary.

Therefore, the Court should strike down Illinois' Rule 2-105(a) as unconstitutionally broad, and thereby establish that all such blanket prohibitions are invalid.

II. STATES WHICH CERTIFY MAY PROHIBIT NON-CERTIFIED ATTORNEYS FROM STATING OR IMPLYING THEY ARE SPECIALISTS

Certification provides objective criteria by which a state can regulate claims of special expertise. State-certified attorneys may represent themselves as specialists. Attorneys who are not state-certified may not represent themselves as specialists.

The result is greater public confidence in attorney advertising.

Minnesota has taken the first step of prohibiting non-certified attorneys from implying special expertise. Under Minnesota Rule 7.4(b), "a lawyer shall not state or imply that the lawyer is a specialist in a field of law unless the lawyer is currently certified as a specialist in that field by a board or other entity which is approved by the State Board of Legal Certification." However, Rule 7.4(a) allows an attorney to "communicate the fact that the lawyer does or does not practice in particular fields of laws."

The result is a non-certified Minnesota attorney may not expressly advertise him/herself as a "specialist," but may imply she/he is a specialist by advertising certain areas of practice. This can be extremely misleading. An

attorney can be admitted to the Bar one day and advertise the next day that his practice is limited to personal injury--implying he is experienced and knowledgeable in that field.

Once a state establishes certification procedures, it may properly prohibit non-certified attorneys from stating or implying they are specialists. Such a regulation is not overly broad, and furthers the legitimate state interest in prohibiting misleading advertising.

III. CERTIFICATION RAISES THE STANDARDS OF PRACTICE

Certification does more than introduce objective criteria for specialization. It produces enlightened self-interest in the legal profession which benefits the client and increases public confidence in the legal profession.

Certification gives certified attorneys a competitive advantage over uncertified attorneys. Therefore, attorneys will have a powerful professional and economic incentive to increase their competence to obtain certification. The incentive is especially potent if attorneys are not allowed to imply specialization by advertising areas of practice. Implied specialization is a shortcut which harms the public -- it allows attorneys to increase business without actually developing special competence.

Fears that certification will encourage excessive specialization are unfounded. Specialization has been a fact of life in the legal profession for decades. See Note, Regulation of Legal Specialization: Neglect By The Organized Bar, 56 Notre Dame Lawyer 293, 293-94 (1980); Hagglund and Birnbaum, Legal

Specialization: The Need For Uniformity, 16 International Society of Barristers Quarterly 405, 406 (1981). Specialization has resulted, in large part, from the inability of the general practitioner to keep abreast of the increasing complexity of fields such as bankruptcy, estates and probate, real property, and environmental law. Zollicoffer, Specialization After Five Years, North Carolina State Bar Quarterly 4, 5 (Spring 1988)

It is the fact of specialization which creates the need for certification. Without certification, the public has no objective criterium to distinguish between the genuine specialist and the pseudo-specialist.

IV. FEDERAL CERTIFICATION

This case can be a vehicle to authorize federal certification of specialists. The ABA could be authorized

to certify organizations such as the NBTA and various ABA sections as certifying agencies. The result would be uniformly high practice standards in the already-existing specialties within the federal courts.

The need for higher practice standards in the federal courts is well documented. See e.g. the Devitt Committee's Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts, 83 F.R.D. 215 (1979). The Devitt Committee recommended the federal courts adopt minimum experience and examination requirements for admission to federal practice. Id. at 222-25. Federal certification would address the same practice deficiencies in a different way -- by enabling the public to distinguish between experienced and inexperienced attorneys, and by giving attorneys an

incentive to improve their skills. Ideally, the Devitt Committee's minimum standards would be enacted to complement certification.

Federal certification would also produce higher standards of practice in state courts. Federal certification would become the hallmark of competence, especially in jurisdictions without state certification.

CONCLUSION

This case is an opportunity for the Supreme Court to restore the practice of law to a profession. Attorneys today are generally more concerned with the short-term costs of developing competence than the long-term benefits of a professional reputation. A decision of this Court allowing accurate, professional specialization advertising by certified lawyers will give attorneys a powerful incentive to develop specialized competence. Such

advertising will also enable the public to identify attorneys competent to handle their specialized legal problems. The resulting improvement of skills and accurate identification of specialists will give the public renewed confidence in the legal profession.

Respectfully Submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

GARY E. PEEL,
Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE NATIONAL BOARD OF TRIAL ADVOCACY IN SUPPORT OF THE PETITIONER

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No. 88-1775

IN THE
Supreme Court of the United States
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GARY E. PEEL,
Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Board of Trial Advocacy hereby moves for leave to file the attached brief *amicus curiae* in support of the Petitioner in this case. The consent of the petitioner has been obtained. The consent of the respondent was requested but refused. The National Board of Trial Advocacy was permitted to participate as *amicus curiae* in this case on the Petition for a Writ of Certiorari and in the Illinois Supreme Court, over the opposition of respondent.

STATEMENT OF INTEREST

This case involves the professional discipline of an attorney, petitioner Gary E. Peel, by the respondent Attorney Registration and Disciplinary Commission of Illinois, for in-

dicating on his letterhead that he is a "Certified Civil Trial Specialist By the National Board of Trial Advocacy." Petitioner has sought review by this Court because this decision conflicts with this Court's decisions regarding the First Amendment rights of attorneys to convey and of the public to receive truthful and non-deceptive information concerning the qualifications of a lawyer and because it conflicts with the holdings of the Supreme Courts of two other states, Minnesota and Alabama, on this precise issue — the public statement of certification by the National Board of Trial Advocacy.

The National Board of Trial Advocacy was founded eleven years ago for the purpose of providing rigorous, objective criteria for the certification of Civil or Criminal Trial Specialists in the legal profession. The Board was organized following the model in the medical profession, where physicians may become Board Certified in their specialty. The purpose for such specialty certification is not only to improve the legal profession by providing substantial standards to which trial lawyers may aspire, but also to improve the delivery of legal services to the public by providing an objective, verifiable measure of experience and ability in the specialty, so that the choice of an attorney may be more fully informed.

The National Board of Trial Advocacy has been endorsed by and is sponsored by several well-respected major national organizations of lawyers who are interested in the quality of the trial bar: American Board of Professional Liability Attorneys, Association of Trial Lawyers of America, International Academy of Trial Lawyers, International Society of Barristers, National Association of Criminal Defense Lawyers, National Association of Women Lawyers and the National District Attorneys Association. In addition, the Board of Directors and Honorary Board of the National Board of Trial Advocacy includes a large number of well-respected trial lawyers throughout the nation, as well as four United States District Court Judges, one United States Court of Appeals Judge, and two State Supreme Court Justices, two law school professors

and one law school dean.

The National Board of Trial Advocacy has certified over 1,000 civil or criminal trial specialists in all 50 states, the District of Columbia and the Virgin Islands. The ability of these 1,000 certified trial specialists to inform the public of their certification is central to the purpose for certification and the National Board of Trial Advocacy. The National Board of Trial Advocacy and its members, therefore, have a strong interest in supporting the right of these lawyers to indicate the true and accurate fact of their certification in their stationary and/or in any advertising.

REASON FOR AMICUS CURIAE BRIEF

Central to the determination of this case are two issues: whether certification by the National Board of Trial Advocacy is meaningful, so that its communication to the public would be non-deceptive; and whether there is a less restrictive method to regulate any potentially misleading certification of specialists by organizations less rigorous then the National Board of Trial Advocacy. The National Board of Trial Advocacy is in a unique position to inform the court of the nature of its certification process, its standards and reliability, so that the Court may properly understand the significance and meaning of a lawyer's certification as a Criminal or Civil Trial Specialist by the National Board of Trial Advocacy. In addition, the National Board of Trial Advocacy is in a unique position to inform the Court of the various ways the states have regulated the public statement of certification by the National Board of Trial Advocacy.

CONCLUSION

Because it is in a unique position to inform this Court of the nature and meaning of its certification, and because it has a strong interest in the outcome of the case, the National Board of Trial Advocacy respectfully requests leave to file an *amicus*

curiae brief in support of the petitioner.

Respectfully submitted,
NATIONAL BOARD OF TRIAL ADVOCACY

by its attorneys,

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IN THE
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ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF OF THE NATIONAL BOARD OF TRIAL ADVOCACY IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST

Please see the Motion for Leave to file Brief *Amicus Curiae, supra,* for the Statement of Interest of the National Board of Trial Advocacy in this case.

ARGUMENT

Introduction

This case involves the professional discipline by the Illinois Attorney Registration and Disciplinary Commission of Gary Peel, an Illinois attorney, for indicating on his office letterhead that he is a "Certified Civil Trial Specialist By the National Board of Trial Advocacy." There is no contention that this statement is false; Mr. Peel in fact met the extensive and demanding concentration, experience, education and peer

review standards, passed the six hour written examination required for certification by the National Board of Trial Advocacy and was certified as a Civil Trial Specialist on September 1, 1981. Certification by the National Board of Trial Advocacy is reviewed every five years, and Mr. Peel again satisfied the experience, concentration, education and peer review requirements and was recertified on September 1, 1986.

There is also no dispute that Mr. Peel indicated the fact of his certification on his office letterhead, and that such an action is in apparent conflict with Illinois Disciplinary Rule (DR) 2-105. This rule was patterned after one recommended to the States by the American Bar Association in its Model Code of Professional Responsibility, and continues to be recommended in substantially similar form as ABA Model Rule of Professional Conduct 7.4. Many states throughout the country apply DR 2-105 or Model Rule 7.4, though others have created exceptions for lawyers certified by State certification programs or by the National Board of Trial Advocacy,[1] and still others have simply deleted Model Rule 7.4 when adopting the Model Rules.[2]

As applied to certification by the National Board of Trial Advocacy, however, DR 2-105 conflicts with the First

[1] States which have their own certification plans include: Arizona, Arkansas, California, Florida, Louisiana, New Jersey, New Mexico, North Carolina, South Carolina, Texas, and Utah. Most of these certify only two or three specialties. Specialists in non-certified areas apparently are prohibited from indicating their specialization. States which have formally approved National Board of Trial Advocacy certification include: Alabama, Connecticut, Georgia and Minnesota.

[2] States which have adopted the Model Rules, but deleted Rule 7.4 include: Kansas, Michigan, North Dakota, and Wyoming. Oklahoma and Rhode Island also have no specific rule on specialties, requiring only that such communications not be misleading. Montana has amended Model Rule 7.4 to permit statements of specialization where a lawyer "is a specialist in a certain field of law by experience in the field, by specialized training or education in the field, or by certification by an authoritative professional entity in the field."

Amendment right of a lawyer to convey, and of the public to receive, truthful, relevant, and helpful information which will assist the public in making an informed choice of an attorney. This Court has held that advertising by a lawyer is "commercial speech" protected by the First Amendment and cannot be banned, but may only be regulated to the extent necessary to insure that it is not false or deceptive.

Part I of this brief will demonstrate that a factually accurate statement by a lawyer that he is certified as a Civil Trial Specialist by the National Board of Trial Advocacy is not deceptive. That section will describe the National Board of Trial Advocacy, the rigorous and objective standards which must be met by an applicant attorney, and the process by which an attorney may become certified. From this description, it will become clear that an attorney who has met these standards in fact possesses experience and a special competence beyond that which is required for admission to the bar. A true statement of an attorney's certification, therefore, is not deceptive and would not mislead the public but would instead provide it with truthful, relevant information which is helpful in the selection of an attorney.

Part II will discuss how other states have treated the National Board of Trial Advocacy. The Supreme Courts of Minnesota and Alabama have declared their disciplinary rules, which were similar to Illinois' DR 2-105, to be unconstitutional as applied to National Board of Trial Advocacy certification, because they interfered with the certified attorney's First Amendment right to convey truthful, accurate and non-deceptive information to the public. No court has held to the contrary, other than Illinois in this case. Other states have amended their ethical rules to permit a statement of specialty certification so long as the lawyer is certified by an approved agency with substantial standards. The National Board of Trial Advocacy is an approved agency in those states. This section demonstrates that less restrictive regulation of specialty certification adequately protects any state interest in protecting the

public from false or misleading claims of certification as a specialist.

The National Board of Trial Advocacy suggests, therefore, that this Court should hold that it is improper to discipline an attorney for stating the true fact of his National Board of Trial Advocacy certification, and that DR 2-105, as applied to National Board of Trial Advocacy certification, is unconstitutional. Illinois may then choose, as the Supreme Courts of Minnesota and Alabama did, to form a committee to approve valid certification agencies like the National Board of Trial Advocacy. The First Amendment probably permits such limited regulation designed to insure that the public is not deceived, but the complete ban on communicating National Board of Trial Advocacy certification cannot stand.

I. THE STATEMENT THAT A LAWYER IS CERTIFIED AS A CIVIL TRIAL SPECIALIST BY THE NATIONAL BOARD OF TRIAL ADVOCACY PROVIDES ACCURATE, MEANINGFUL AND HELPFUL INFORMATION TO THE PUBLIC AND IS NOT MISLEADING OR DECEPTIVE BECAUSE THE NATIONAL BOARD OF TRIAL ADVOCACY IS A WELL-RESPECTED, REPUTABLE AGENCY WHICH APPLIES OBJECTIVE, VERIFIABLE, RIGOROUS AND MEANINGFUL STANDARDS IN ITS CERTIFICATION PROCESS.

The National Board of Trial Advocacy was established in 1977 as a direct result of the Roscoe Pound — American Trial Lawyers Foundation Conference on Trial Specialty held in 1976. Its purpose was twofold. First, the National Board of Trial Advocacy sought to improve the quality of the trial bar by creating rigorous standards for certification to which lawyers could aspire. Second, the National Board of Trial Advocacy sought to improve the delivery of legal services to the public by providing an objective, verifiable measure of experience, ability and concentration in civil or criminal trial advocacy so that the public's choice of a lawyer for that type of case could be made in an informed manner. To these ends, the National Board of Trial Advocacy created a credentialling process along the lines followed in the medical profession for Board Certification. The National Board of Trial Advocacy program is national in scope, with substantial, meaningful criteria to insure that certified lawyers in fact have the special competence in their field of trial advocacy so that they may accurately be described as Civil or Criminal Trial Specialists.

The National Board of Trial Advocacy is endorsed in both its purposes and its program by seven well respected national organizations of lawyers and judges which are concerned with the quality of legal services in the trial advocacy area. They are:

American Board of Professional Liability Attorneys
Association of Trial Lawyers of America
International Academy of Trial Lawyers
International Society of Barristers
National Association of Criminal Defense Lawyers
National Association of Women Lawyers
National District Attorneys Association

Each of these organizations, by their institutional sponsorship of the National Board of Trial Advocacy, has determined: (1) that the quality of the trial bar will be enhanced by the establishment of rigorous standards to which lawyers can aspire; (2) that the public interest in an informed selection of an attorney will be served by the creation of a credentialling program through which experienced and able trial specialists can be identified; and (3) that the National Board of Trial Advocacy standards and its certification process effectuate those goals.

The National Board of Trial Advocacy program is supervised and directed by a most distinguished group of lawyers, judges and legal educators. A complete listing of the achievements and honors of the 20 member Board of Directors

and 20 member Honorary Board would cause this brief to exceed the allotted page limitations, but a brief description of some of the board members will help this court to understand the nature and quality of the National Board of Trial Advocacy program.

President and Chairman of the Board, Jacob D. Fuchsberg of New York, New York, has served as President of the Association of Trial Lawyers of America, President of the Roscoe Pound-American Trial Lawyers Foundation, President of the New York State Trial Lawyers Association, a member of the Executive Committee of the National Advisory Committee of the United States Legal Services Program, and a Trustee of the New York University School of Law. He is Chairman of the Board of Touro College, The Jacob D. Fuchsberg Law Center. Mr. Fuchsberg was honored to serve as a Judge of the New York State Court of Appeals from 1975 to 1983. He is the author or editor of numerous books and articles on trial advocacy.

The immediate past President and Chairman of the Board, J.D. Lee of Knoxville, Tennessee, has served as President of the Association of Trial Lawyers of America, President of the Trial Lawyers for Public Justice, President of the Tennessee Trial Lawyers Association, and President of the Tennessee Constitutional Convention. He is a Fellow of the International Society of Barristers and a Fellow and member of the Board of Directors of the International Academy of Trial Lawyers. Mr. Lee has authored four books and numerous articles on trial advocacy.

Founder and former Chairman of the Board, Theodore I. Koskoff of Bridgeport, Connecticut has served as President of the Association of Trial Lawyers of America, President of the Roscoe Pound - American Trial Lawyers Foundation, and President of the Connecticut Trial Lawyers Association. Until his recent death, Mr. Koskoff continued his relationship with the National Board of Trial Advocacy as Of Counsel to the Board.

Among the lawyer members of the Board are six former Presidents of the Association of Trial Lawyers of America, including J.D. Lee, as well as: Scott Baldwin from Marshall, Texas; Jacob D. Fuchsberg and Richard F. Gerry from San Diego, California; Robert L. Habush from Milwaukee, Wisconsin; and David S. Schrager from Philadelphia, Pennsylvania. Two former Presidents of the International Academy of Trial Lawyers serve on the Board: Walter H. Beckham, Jr., from Miami, Florida; and Lee S. Kreindler from New York, New York. Other Board members who have served as President of major national and international trial lawyer organizations include: Kenneth S. Broun from Raleigh, North Carolina, former Director of the National Institute for Trial Advocacy (and former Dean of the University of North Carolina Law School); Judge Jim R. Carrigan from Denver, Colorado, former Director of the National Institute for Trial Advocacy; Joseph H. Cummins from Los Angeles, California, former President of the American Board of Trial Advocates; Mary Jo Cusack from Columbus, Ohio, former President of the National Association of Women Lawyers; Gerald S. Gold from Cleveland, Ohio, former President of the National Association of Criminal Defense Lawyers; Dr. Harvey Wachsman from Great Neck, New York, President of the American Board of Professional Liability Attorneys, and Craig Spangenberg, of Cleveland, Ohio, former President of the International Society of Barristers and former Dean of the International Academy of Trial Lawyers.

Included among the Board of the National Board of Trial Advocacy are a number of distinguished judges and former judges. They include, in addition to Jacob D. Fuchsberg: Douglas K. Amdahl, Chief Justice of the Minnesota Supreme Court; Jim R. Carrigan, United States District Judge, District of Colorado, formerly Justice of the Colorado Supreme Court (and former Professor of Law at the University of Colorado Law School); William H. Erickson, Justice of the Colorado Supreme Court; Douglas W. Hillman, Chief Judge, United

States District Court, Western District of Michigan; Donald P. Lay, Chief Judge, United States Court of Appeals for the Eighth Circuit; Joseph H. Rodriguez, United States District Judge, District of New Jersey; John A. Speziale, former Chief Justice of the Connecticut Supreme Court; and Henry Woods, United States District Judge, Eastern District of Arkansas.

The legal academic community is also represented on the Board of the National Board of Trial Advocacy. In addition to Judge Jim R. Carrigan, former Professor of Law at the University of Colorado Law School, and Kenneth S. Broun, former Dean of the University of North Carolina Law School, two current law professors and one law school dean serve on the Board. They are: David J. Sargent, Dean of Suffolk University Law School in Boston, Massachusetts; James W. Jeans, Professor of Law at the Law School of the University of Missouri at Kansas City (and noted author on trial advocacy); and Stephen Wizner, Professor of Law at Yale Law School in New Haven, Connecticut.

The National Board of Trial Advocacy is in residence at Suffolk University Law School in Boston, Massachusetts, and its Executive Director is Suffolk University Law Professor Timothy Wilton. Professor Wilton, who supervises the day to day operations of the National Board of Trial Advocacy, received his B.A. in 1968 from Harvard University and his J.D. in 1971 and his LL.M. in 1977, both from Harvard Law School. Professor Wilton had extensive trial and litigation experience before he became a law professor in 1977. He teaches or has taught Trial Advocacy, Evidence, Civil Procedure Public Interest Litigation, and Constitutional Law. He has published extensively in trial and litigation related areas and has lectured at meetings of the American Bar Association and the Association of American Law Schools. Professor Wilton has recently been appointed to the Standing Committee on Specialization of the American Bar Association.

As the quality of its institutional sponsors, its Board, and its staff all demonstrate, the National Board of Trial Advocacy

is a very well respected, reputable, *bona fide* legal organization, whose integrity and competence can be relied upon. As would be expected from an organization of this caliber, the standards and certification process it implements are rigorous and meaningful. The standards for certification as a Civil Trial Specialist are[3] as follows:

1. **Current Bar Membership in Good Standing:** Applicants must demonstrate current bar membership in good standing in the state of their admission, or, if admitted in more than one state, in the state of their principal practice.

2. **Disclosure of Misconduct:** Candidates for National Board of Trial Advocacy certification must disclose any convictions of crimes or proceedings in which they were subjected to professional discipline. The National Board of Trial Advocacy Board assesses any such instances of misconduct to determine the candidates' suitability for certification.

3. **Years of Experience in the Specialty:** Candidates must show at least five years of actual practice in civil trial law during the period immediately preceding the application for certification. Three years of extraordinary practice may be allowed in some cases.

4. **Substantial Involvement in the Specialty:** Applicants must show substantial involvement in trial practice; at least

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[3] The Illinois Supreme Court noted the discrepancy in the number of trials required for certification as described by Gary Peel, the Association of Trial Lawyers of America (ATLA), and the National Board of Trial Advocacy. The discrepancy apparently was a result of recent changes in this standard by the Board of Directors of the National Board of Trial Advocacy in an effort more accurately to describe a level of experience which should be required of a lawyer before he or she may be certified as a specialist. The National Board of Trial Advocacy brief outlined the current standard, while ATLA described an earlier standard. What is important is that the standard is and has always been a rigorous and substantial one, and one which demonstrates a significant level of experience in the specialty.

thirty percent of professional time must be spent in civil trial litigation during each of the five years preceding the filing of the application.

5. **Substantial Experience in the Specialty:** Candidates for civil trial certification must also demonstrate their experience by showing that they have appeared as lead counsel in not less than fifteen complete trials of civil matters to verdict or judgment, including not less than 45 full days of trial; at least five of these trials must be to a jury. In addition, applicants must have appeared as lead counsel in at least forty additional contested matters involving the taking of testimony. These may include trials, evidentiary hearings, depositions, or motions heard before or after trial.

6. **Educational Requirements:** Candidates must show participation in forty-five hours of continuing legal education in the specialty in the three year period preceding the application. This requirement may be fulfilled by a variety of activities approved by the National Board of Trial Advocacy Board of Directors. These activities include teaching courses or seminars in trial law; participation as a panelist, speaker, or workshop leader in conferences; authorship of books or professional articles on trial law; and participation in the work of professional committees.

7. **Peer Review:** Each candidate must provide as references the names of six attorneys who are not present partners or associates of the candidate. These attorneys must be substantially involved in the candidate's field of trial law and must be familiar with the candidate's practice in that field. At least one reference must be from a judge before whom the candidate has appeared as an advocate within two years of application. At least two references must be from a lawyer with whom or against whom the candidate had tried a matter in that field. As a general matter, the National Board of Trial Advocacy requests, and candidates provide, references from three judges and three lawyers with or against whom they have tried cases. The six named references complete a confidential four-page

questionnaire with rankings on various criteria regarding the candidate.

8. **Trial Court Memorandum:** Applicants must submit a copy of a substantial trial court memorandum or brief prepared and submitted to a court within three years of application. The quality of the memorandum or brief is carefully examined by the National Board of Trial Advocacy to determine qualification for certification.

9. **Examination:** Applicants must pass a rigorous day-long written examination designed to test experience, proficiency, and knowledge in civil or criminal trial law. This examination contains questions regarding substantive and procedural law as well as trial tactics in various areas of trial practice, and questions on evidence and professional ethics. The examination is administered twice every year throughout the nation, and a new examination is prepared for each administration.

Lawyers successfully fulfilling the requirements for certification must apply for recertification every five years. The recertification standards are desigend to insure that the certified lawyer has continued an active trial practice. They are similar to the initial trial standards except that the applicant does not need to retake the examination or submit another trial brief, and the number of trials and other matters required is less. Otherwise, the standards again require current good standing in the Bar, disclosure of professional discipline, participation as lead counsel in a number of complete trials, continuing legal education in the specialty, and additional references from lawyers and judges.

In addition to rigorously testing the experience, skill, and proficiency of candidates for certification, the National Board of Trial Advocacy certification process is impartial and objective to protect the public from unreliable claims of special expertise in trial advocacy. No preference is given in the certification process to members of sponsoring organizations. Board members cannot seek certification while serving on the Board.

Examinations are graded anonymously, by number rather than name. In addition, the standards are applied in a rigorous, meaningful fashion. Applicants have been rejected because of insufficiency of trial experience as lead counsel, inadequate quality of the sample trial memorandum, lack of adequate participation in continuing legal education, or below average ratings on peer review. In addition, many applicants have been rejected for insufficient performance on the rigorous and demanding examination. A lawyer who is refused certification or recertification may not apply again for certification until one year after the date of such refusal, denial, or revocation.

As the preceding discussion demonstrates, the National Board of Trial Advocacy is a well respected, reputable organization which applies rigorous, comprehensive standards in its certification process. A lawyer who satisifies these standards in fact has demonstrated a special competence in civil trial advocacy by reason of his *concentration* of a substantial percentage of his professional time in the specialty, his extensive *experience* in the specialty, indicated by being lead counsel in 15 complete trials and 40 other matters, as well as the requirements of five years of concentration in the specialty and 45 hours of continuing legal education in the specialty, and significant *ability* in the specialty as evidenced by superior ratings on peer review questionnaires by judges and other lawyers, on the submitted trial memorandum, and on the day-long comprehensive examination. The fact that a lawyer has met these rigorous standards is information which a person seeking a lawyer for such a case would find helpful and relevant in selecting an attorney. Such a lawyer can accurately be called a Civil Trial Specialist, without in any way deceiving the public.

The traditional concern with a lawyer's holding himself out as a specialist is that the term implies that the lawyer has special competence in the field beyond that of other non-specialist lawyers. While that implication may be deceptive in some cases in the absence of standards to insure that the lawyer

in fact has special competence, in the case of an attorney certified by the National Board of Trial Advocacy, it is true and accurate. Lawyers who meet the National Board of Trial Advocacy requirements have indeed demonstrated that they possess experience and ability beyond that of the average lawyer. This is precisely the kind of truthful, accurate, relevant information which the public should have access to.

II. TWO STATE SUPREME COURTS HAVE HELD THAT A STATEMENT OF NATIONAL BOARD OF TRIAL ADVOCACY CERTIFICATION IS NOT DECEPTIVE AND THAT THEIR DISCIPLINARY RULES WHICH PROHIBITED SUCH SPEECH CONFLICTED WITH THE FIRST AMENDMENT; UNTIL THIS CASE, NO COURT HAS EVER HELD TO THE CONTRARY; OTHER STATES HAVE ALSO FORMALLY RECOGNIZED NATIONAL BOARD OF TRIAL ADVOCACY CERTIFICATION.

On two previous occasions, the Supreme Courts of other states have considered the interaction of the First Amendment, their disciplinary rules regarding specialty advertising, which were similar to Illinois' DR 2-105, and a lawyer's public statement that he was certified by the National Board of Trial Advocacy. In both cases, the disciplinary rules were struck down as unconstitutional because they prohibited the dissemination of this truthful, relevant and non-deceptive information. These are the only other two cases to consider this question, and other than in the instant case, no court has ever held to the contrary.

In *In Re Johnson*, 341 N.W.2d 282 (Minn. 1983), the Minnesota Supreme Court reviewed the disciplinary proceedings brought against an attorney for advertising his certification by the National Board of Trial Advocacy. The court found its own rule unconstitutional as applied to this situation:

> Richard W. Johnson was admonished for advertising his certification as a Civil Trial Specialist by the National

> Board of Trial Advocacy (NBTA). Rule 2-105(B) of the Minnesota Code of Professional Responsibility prohibits a lawyer from holding himself or herself out as a specialist. Disciplinary Rule (DR)2-105(B) is unconstitutional and the admonishment against Johnson is vacated.

Id. at 282. The court reviewed the First Amendment precedents, as well as the certification process of the National Board of Trial Advocacy, which the court found to be "rigorous and exacting:"

> NBTA applies a rigorous and exacting set of standards and examinations on a national scale before certifying a lawyer as a trial specialist, either criminal or civil or both.

Id. at 283. Finally the court commented on the laudable purposes of the disciplinary rule, but noted its overbreadth in suppressing non-deceptive certifications like that of the National Board of Trial Advocacy, and held it to be unconstitutional:

> Applying *R.M.J.* and *Appert* [*Matter of Discipline of Appert*, 315 N.W.2d 204 (Minn. 1981)] to the facts of this case, it appears that DR 2-105(B) is too restrictive. The rule is designed to prevent misleading an uninformed public by claims of specialization and quality of services. That in and of itself is a meritorious goal. But the method used to achieve that goal is to impose a blanket prohibition on all commercial speech regarding specialization until the Minnesota Supreme Court promulgates rules describing what specialty designations will be accepted and how to get that designation. In view of the overbreadth of the rule, the lack of presentation to this court of proposed rules, and the finding of the panel that this advertisement was not misleading or deceptive, there is no basis for upholding the rule in this case. DR 2-105(B) is hereby declared unconstitutional on its face and as applied and the admonition issued by the director of the Board of Professional Responsibility against Richard W. Johnson is hereby vacated.

Id. at 285. In response to this case, the Minnesota State Bar Association proposed, and the Minnesota Supreme Court

adopted, a new disciplinary rule which outlined a program to regulate the advertising of specialty certification in order to protect the public from claims of certification based on inadequate standards. The program created a State Board of Legal Certification which reviewed and approved or disapproved certification agencies based on the quality of their program and the sufficiency of their standards. The National Board of Trial Advocacy has been approved as an authorized certifying agency by the Minnesota State Board of Legal Certification.

In *Ex Parte Howell*, 487 So. 2d 848 (Ala. 1986), the Alabama Supreme Court considered the constitutionality of its disciplinary rule regarding a lawyer holding himself out as a certified specialist, which was similar to that of Illinois, as applied to certification by the National Board of Trial Advocacy. The Alabama Bar Association raised the same arguments in that case that the Disciplinary Commission has in this case, including the worry that permitting public statements regarding certification might "spawn spurious certifying organizations whose certifications would be meaningless." *Id.* at 851. The Alabama Supreme Court rejected these arguments. It held that the public dissemination of the fact of a lawyer's certification by the National Board of Trial Advocacy would be meaningful information for the public and not in any way deceptive or misleading:

> It would be less than realistic for us to take the position that all lawyers, in fact, possess equal experience, knowledge, and skills with regard to any given area of legal practice. Although there is presently no state-sanctioned mechanism for identifying legal specialists, it appears to us that a certification of specialty by the NBTA [National Board of Trial Advocacy] would indicate a level of expertise with regard to trial advocacy in excess of the level of expertise required for admission to the bar generally. We conclude, therefore, that Howell's proposed advertisement of certification by the NBTA as a civil trial advocate would not be misleading or deceptive on its face.

Id.

The Alabama Supreme Court, with the benefit of the Minnesota experience to draw from, then directed the Bar Association to formulate a plan along the lines of the Minnesota plan to evaluate certifying agencies in order to protect the public from spurious agencies and meaningless certifications:

> We direct the Bar Association to formulate a proposed rule and a method for approving certifying organizations such as the NBTA before allowing the certifications to be advertised. Such a procedure . . . will reduce the possibility of spurious certifying organizations being used to mislead the public.

Id. The Bar Association proposed, and the Alabama Supreme Court adopted such a rule. The National Board of Trial Advocacy has been approved under that rule.

In two other states, Connecticut and Georgia, the disciplinary rules have been amended without the need for litigation in order to create the same kind of approval process for certifying agencies as exists in Minnesota and Alabama. The National Board of Trial Advocacy is approved in both Connecticut and Georgia.

In some other states, the Supreme Courts or Bar Associations have created their own certification process.[4] The National Board of Trial Advocacy cooperates with and has been recognized by a number of these states. The National Board of Trial Advocacy requires that any applicant from a state which operates its own certification program must first be certified by that state program before he may apply for certification by the National Board of Trial Advocacy. When Florida implemented its own state certification program for Civil Trial Advocacy in 1982, for example, it recognized and accepted certification by the National Board of Trial Advocacy as a satisfactory equivalent for the Florida certification examination, so that lawyers with National Board of Trial Advocacy certification were exempted from the examination. The same recognition and exemption was included when Florida implemented its Criminal Trial Advocacy certification in 1986.

4. *See* note 1, *supra*.

The method of regulation of specialty certification in states like Alabama, Connecticut, Georgia and Minnesota, in which a state official or board reviews the standards and operations of certification agencies, provides adequate protection to any state interest in protecting the public from fraudulent claims of specialization, while imposing less of a burden on the first amendment rights of lawyers to convey, and of the public to receive, such important information to aid the public in the selection of an attorney. In light of this less restrictive means of implementing the state interest, Illinois' blanket prohibition of communicating even truthful statements of certification as a specialist violates the First Amendment.

CONCLUSION

Thus, prior to this case, the states which have considered the question have uniformly determined: (1) that the National Board of Trial Advocacy is a reputable organization with rigorous and comprehensive certification standards; (2) that a lawyer's public statement of his certification by the National Board of Trial Advocacy is useful, accurate information for the public, and is not misleading or deceptive; and (3) that discipline of an attorney for publicly stating that he is certified by the National Board of Trial Advocacy would violate the First Amendment.

This Court should hold that the truthful statement of certification by the National Board of Trial Advocacy is protected by the First Amendment and that Illinois' blanket prohibition of statements of specialty certification cannot stand.

Respectfully submitted,

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by its attorneys,

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